Nos. 554–555

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 554

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY AND STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY, APPELLANTS

v.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, AND MUTUAL BROADCASTING SYSTEM, INC., APPELLEES

No. 555

COLUMBIA BROADCASTING SYSTEM, INC., APPELLANT

v.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, AND MUTUAL BROADCASTING SYSTEM, INC., APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION

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OPINION BELOW

The district court wrote a single opinion granting the motions for summary judgment which the

Government had filed in the two cases. This opinion appears at pages 522–532 of the NBC record (No. 554) and at pages 483–493 of the CBS record (No. 555).

Earlier opinions of the lower court and of this Court are reported as follows: The opinion of the district court on the Government's motions to dismiss for lack of jurisdiction (NBC R. 456–469) is reported in 44 F. Supp. 688. The per curiam opinion of the district court granting a temporary stay pending appeal (NBC R. 473–474) is reported in 44 F. Supp. 696. The opinion of this Court holding that the district court has jurisdiction of the cases (NBC R. 476–510) is reported in 316 U. S. 407.

JURISDICTION

The decision of the court below was entered on November 16, 1942. Petitions for appeal therefrom were filed on November 25, 1942, and were allowed on the same day (NBC R. 534–537; CBS R. 496–497). On December 14, 1942, this Court noted probable jurisdiction. The jurisdiction of this Court on appeal rests on the Act of October 22, 1913, 38 Stat. 219, 220, 28 U. S. C., secs. 47–47a, as extended by the Communications Act of 1934, 48 Stat. 1064, 47 U. S. C., sec. 402 (a).

QUESTIONS PRESENTED

The Federal Communications Commission is authorized to license radio stations where it finds that the public interest, convenience or necessity

will be served. In addition, it is empowered "to make special regulations applicable to radio stations engaged in chain broadcasting." Beginning in 1938 the Commission undertook an extensive investigation of chain broadcasting practices. Hearings were held and a record of over 8,000 pages of testimony and more than 700 exhibits was compiled. Approximately two-thirds of this record represents evidence presented by the appellant networks.

The investigation disclosed the dominant position of the appellant networks in the broadcasting field. At the end of 1938 over 85% of the nation's total nighttime broadcasting power was available exclusively to these networks; in fact, many of the most desirable stations were actually owned by them. The business done by NBC and CBS represented more than half of the entire business of the industry.

The investigation further disclosed that the standard contracts between the appellant networks and their affiliated stations prevented the stations for five years from taking programs from any other network; similarly, the network was prevented from furnishing its programs to any other station in the service area of its regular affiliate—even those programs which the regular affiliate did not carry. Also, NBC and CBS held options by which they could require their affiliates on 28 days' notice to substitute a network

commercial program for any program the affiliate had scheduled. In addition, the affiliates were given only limited opportunity to reject network commercial programs which they deemed unsuitable. The restraints on competition were further aggravated by the fact that NBC and CBS themselves owned many of the most desirable stations and particularly by the fact that NBC operated two networks—the "Red" and the "Blue." The Commission found that these provisions and circumstances were contrary to the public interest in that they tended to divest individual licensees of their statutory responsibility for the operation of their stations, prevented the widest and most effective use of radio facilities, and restrained competition in the broadcasting field.

To meet this situation the Commission promulgated the eight chain broadcasting regulations, set out below (pp. 5–9), the validity of which is challenged by these suits. The questions presented on these appeals from the orders of the district court dismissing the appellants' complaints are as follows:

1. Whether the Commission has statutory authority to adopt the regulations in question.

2. Whether the regulations are arbitrary or capricious.

3. Whether, if the Communications Act authorizes the Commission to adopt the regulations, such Act unconstitutionally delegates legislative power or abridges freedom of speech in violation of the First Amendment.

4. Whether the court below properly disposed of the cases on the basis of the administrative record, the pleadings, and the motions, without taking further evidence.

STATUTES INVOLVED

The pertinent provisions of the Communications Act of 1934, 47 U. S. C. secs. 151, et seq., are set forth in the Appendix, *infra*, pp. 139–149.

REGULATIONS INVOLVED

The Chain Broadcasting Regulations provide as follows:

> SEC. 3.101. *Exclusive affiliation of station.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization[1] under which the station is prevented or hindered from, or penalized for, broadcasting the programs of any other network organization.
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> SEC. 3.102. *Territorial exclusivity.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or

[1] The term "network organization" as used herein includes national and regional network organizations.

hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization.

SEC. 3.103. *Term of affiliation.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two years: *Provided,* That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period.

SEC. 3.104. *Option time.*—No license shall be granted to a standard broadcast station which options[2] for network programs any

[2] As used in this section, an option is any contract, arrangement, or understanding, express or implied, between a station and a network organization which prevents or hinders the station from scheduling programs before the network agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time.

time subject to call on less than 56 days' notice, or more time than a total of three hours[3] within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8:00 a. m. to 1:00 p. m.; 1:00 p. m. to 6:00 p. m.; 6:00 p. m. to 11:00 p. m.; 11:00 p. m. to 8:00 a. m.[4] Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations.

SEC. 3.105. *Right to reject programs.*— No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding; express or implied, with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station from rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to

[3] All time options permitted under this section must be for specified clock hours, expressed in terms of any time system set forth in the contract agreed upon by the station and network organization. Shifts from daylight-saving to standard time or vice versa may or may not shift the specified hours correspondingly as agreed by the station and network organization.

[4] These segments are to be determined for each station in terms of local time at the location of the station but may remain constant throughout the year regardless of shifts from standard to daylight-saving time or vice versa.

network programs so offered or already contracted for, prevents the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance.

SEC. 3.106. *Network ownership of stations.*—No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control[5] with a network organization, for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing.

SEC. 3.107. *Dual network operation.*—No license shall be issued to a standard broadcast station affiliated with a network organization which maintains more than one network: *Provided,* That this regulation shall not be applicable if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served

[5] The word "control" as used herein, is not limited to full control but includes such a measure of control as would substantially affect the availability of the station to other networks.

by the group of stations comprising each such network.

SEC. 3.108. *Control by networks of station rates.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs.

[*Effective date.*] These regulations shall become effective immediately: *Provided,* That, with respect to existing contracts, arrangements or understandings, or network organization station licenses, the effective date shall be deferred until November 15, 1941: *Provided further,* That the effective date of Regulation 3.106 with respect to any station may be extended from time to time in order to permit the orderly disposition of properties: *And provided further,* That the effective date of Regulation 3.107 shall be suspended indefinitely and any further order of the Commission placing said Regulation 3.107 in effect shall provide for not less than six months' notice and for further extension of the effective date from time to time in order to permit the orderly disposition of properties.

STATEMENT

These suits were brought on October 30, 1941, to enjoin the enforcement of the Commission's regula-

tions, relating to radio stations engaged in chain broadcasting,[6] which were adopted by the Federal Communications Commission on May 2, 1941, and amended October 11, 1941. There are eight such regulations, designated by the Commission as Regulations 3.101 to 3.108, inclusive (*supra*, pp. 5–9).

At the time they brought these suits the plaintiffs, National Broadcasting Company, Inc. (herein called NBC), and Columbia Broadcasting System, Inc. (herein called CBS), operated three of the four nation-wide "chains" or "networks."[7] Plaintiffs, Woodmen of the World Life Insurance Society and Stromberg-Carlson Telephone Manufacturing Company, were the licensees respectively

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[6] Chain broadcasting is the principal means by which particular radio programs are made simultaneously available to all or a large part of the national radio audience. It is defined in Section 3 (p) of the Communications Act as the "simultaneous broadcasting of an identical program by two or more connected stations" and is accomplished by sending the program by telephone wire from its point of origin to each of the outlet stations of the chain or network for broadcasting over their transmitters. These outlet stations are in some instances owned and operated by the network organizations themselves, but more commonly they are independently owned and are associated with the network by means of an "affiliation contract."

[7] NBC then operated two networks known as the "Red" and the "Blue," but shortly after suit was begun NBC advised the court below that it had disposed of the Blue network (NBC R. 458). NBC has transferred the Blue network to a new corporation—Blue Network, Inc.—which, like NBC, is a wholly owned subsidiary of the Radio Corporation of America (NBC Br. 5).

of Stations WOW at Omaha, Nebraska,* and WHAM, at Rochester, New York, which are affiliated with NBC and thereby are engaged in chain broadcasting (NBC R. 4, 5, 6).

The United States and the Federal Communications Commission were joined as defendants in the suit brought by NBC. The CBS suit was brought against the United States alone, but the Federal Communications Commission intervened as a defendant. Mutual Broadcasting System, Inc., which operates the fourth national network, intervened in both cases as a defendant. The complaint of NBC, Woodmen, and Stromberg (No. 554) requests the Court to enjoin the enforcement of all eight of the Commission's chain broadcasting regulations. The CBS complaint (No. 555) seeks an injunction against Regulations 3.101 to 3.106 only. Both complaints allege in substance that the Federal Communications Commission has no power under the Communications Act of 1934 to issue the regulations in question, and that they are arbitrary, unreasonable, unconstitutional, and without basis in the evidence (NBC R. 15; CBS R. 10–11).

On November 8, 1941, the Government filed motions to dismiss the complaints or, in the alterna-

*The Commission on December 15, 1942, authorized the transfer of Station WOW from Woodmen of the World Life Insurance Society to Radio Station WOW, Inc., and is now advised that this transfer was consummated on January 14, 1943 (File B4–AL–354).

tive, for summary judgment (NBC R. 387–388; CBS R. 469)*. On February 1, 1942, the motions to dismiss for lack of jurisdiction were granted (NBC R. 456–469); but on appeal, this Court on June 1, 1942, reversed and remanded the case for further proceedings (NBC R. 476–510). On the remand reargument was held on the Government's motions for summary judgment. The motions were granted, and the complaints were dismissed (NBC R. 522–534; CBS R. 483–494).

THE COMMISSION'S INVESTIGATION, REPORT, AND REGULATIONS

1. THE PROCEEDINGS BEFORE THE COMMISSION

The regulations attacked in these suits were adopted by the Commission as the result of an investigation instituted on March 18, 1938, "to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience, or necessity" (NBC R. 27–28; CBS R. 36–38).

On April 6, 1938, a committee of three commissioners was appointed to hold hearings and to make a report with recommendations to the Commission.

The national and regional networks, station licensees, and recording and transcription companies were invited to appear and present evidence.

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*Upon the filing of these motions a stipulation was entered into for the suspension of the regulations pending a hearing on the motions (NBC R. 454; CBS R. 474–475).

Other persons who requested an opportunity to appear were heard. The committee held hearings between November 14, 1938, and May 19, 1939 (NBC R. 389; CBS R. 470–471).[10]

On June 12, 1940, the committee issued its report. Thereafter, briefs were filed on behalf of the national networks and other interested parties, and oral arguments were presented before the full Commission. On May 2, 1941, the Commission issued its Report, together with an order adopting the eight regulations here attacked.[11] The Commission's Report deferred for 90 days the effective date of the regulations with respect to existing contracts and licenses of network-operated stations. Subsequently, the effective date was postponed by the Commission pending action by the Commission on a petition filed by Mutual for amendments to two

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[10] The record before the Commission was filed with the court below in support of the Government's motions to dismiss the complaint or in the alternative for summary judgment, and also in opposition to appellants' motions for preliminary injunction (NBC R. 263, 392; CBS R. 355, 473). This record has been certified to this Court as an original exhibit. It has not been printed, but the parties have stipulated that it may be referred to in the briefs (NBC R. 546–547; CBS R. 506). It is referred to hereafter as "Tr."

[11] The Commission's Report is attached to NBC's complaint as Exhibit D (R. 29–200) and to the CBS complaint as Exhibit B (R. 49–216). Two of the seven commissioners filed additional views, which are included in the Report, dissenting from the action taken by the Commission.

of the regulations (NBC R. 389–390; CBS R. 471–472).

The Mutual petition, filed August 14, 1941, asked the Commission to amend Regulations 3.103 and 3.104. Briefs were filed by the national networks and one regional network, and oral argument was had before the Commission on September 12, 1941. Thereafter, on October 11, 1941, the Commission issued a Supplemental Report,[12] together with amendments to three of the regulations (3.102, 3.103, and 3.104). The Commission simultaneously postponed the effective date of the regulations with respect to existing contracts and licenses of network-operated stations until November 15, 1941, and suspended the effective date of Regulation 3.107 indefinitely, with the provision that any subsequent order of the Commission placing Regulation 3.107 into effect should provide for not less than six months' notice (NBC R. 390–392; CBS R. 472–473).[13] As set forth above, these suits were

[12] The Supplemental Report is attached to the NBC complaint as Exhibit E (R. 201–217) and to the CBS complaint as Exhibit C (R. 20–36). Two of the six commissioners (there being at that time one vacancy on the Commission) dissented from the Supplemental Report in an opinion included therein.

[13] On October 31, 1941, the Commission adopted a Minute (NBC R. 391–392; CBS R. 472–473) with reference to the procedure which it proposes to follow in applying the policies announced in the chain broadcasting regulations. The Minute sets forth that if any licensee wishes to contest the validity of the regulations or the reasonableness of their

filed on October 30, 1941. Since that date the regulations have been suspended either by court order or by order of the Commission."[14]

2. FACTS DEVELOPED BY THE COMMISSION'S INVESTIGATION

a. *Background.*—The chain broadcasting regulations here attacked are applicable to radio broadcasting stations operated in the "standard broadcast band." This band—550 kilocycles to 1600 kilocycles[15]—is a small portion of the entire radio spectrum, the balance of which is allocated for other radio uses.

Within the standard band there are approximately 106 "channels" available for broadcasting

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application to the particular licensee, the license will be designated for hearing. It further provides that such licensee will be granted a temporary extension of his license so that he may remain on the air pending the proceeding before the Commission and pending appeal to the courts from a decision in any such proceeding; and, further, that in the event the validity of the regulations as applied to the licensee should be upheld, the Commission would nevertheless grant a regular license to the licensee if he thereupon conforms to the decision in the litigation.

[14] On January 19, 1943, the Commission adopted a minute suspending the effective date of the regulations until April 1, 1943, or the decision of this Court, whichever is earlier.

[15] Federal Communications Commission Rules and Regulations, Part 2, Appendix B, Frequency Allocations. A copy of the Commission's Rules and Regulations has been filed with the Clerk.

stations.[16] These 106 channels are occupied by some 900 licensed broadcast stations. The number of stations which can be placed on a single channel without causing wasteful interference is determined by the power and location of the stations, and the design of their transmitting antennae.[17]

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[16] In order that there be opportunity for effective selection by listeners among radio stations, the Commission's rules require a separation of 10 kilocycles between each channel. (See Federal Communications Commission Rules and Regulations, Sec. 3.3.)

[17] On six channels the Commission licenses only "local" stations operating with power of 100 or 250 watts; many such stations can be assigned to a single channel, as each station renders service to only a small area. About 40 channels are assigned for the medium-sized "regional" stations, which utilize from 500 watts to 5 kilowatts power, and about 45 channels for the powerful "clear channel" stations, which may use from 10 to 50 kilowatts.

Depending on power, location, and antenna design, from one to four clear channel stations can usually be placed on a single channel. These large stations are important in furnishing service to the rural areas. Both day and night, they furnish a reliable and consistent "primary" service which may extend as far as 150 miles from the transmitter. At night, such stations also furnish a "secondary," or "sky-wave" service, which results from the reflection of radio waves from the so-called Kennelly-Heaviside layer, many miles above the surface of the earth. This "secondary" service extends for hundreds of miles from the transmitter, and is the only radio service which large areas of the country receive, but it is weaker, and more fluctuating and uncertain, than "primary" radio service, and in general is usable only between sunset and sunrise. See Sec. 3.11, Federal Communications Commission Rules and Regulations, and Standards of Good Engineering Practice Concerning Standard Broadcast Stations, Sec. 1.

The limited portion of the radio spectrum available for broadcasting restricts not only the total number of broadcast stations, but, if fair distribution is to be made, the number which can be established in particular communities. New York City, Chicago, and Los Angeles have a dozen or more stations each, and most of the other very large cities have from 5 to 8 stations. Some 35 cities have 4 or more full-time[18] stations, and some 25 others have 3 (NBC R. 87, 104; CBS R. 107, 124).

All these stations, depending on their power and the nature of the surrounding territory, serve a variety of functions and purposes. The programs which they provide may be local, regional, or national in character. Except for a few non-commercial stations, however, all of them are supported by selling time for the use of their broadcasting facilities for advertising purposes. These revenue-producing programs are called "commercial" or "sponsored" programs, as distinguished from "sustaining" programs, which are provided by the station itself without commercial sponsorship (NBC R. 41, 75–76; CBS R. 61, 95–96).

Because no single station or small group of stations is able to provide truly national coverage,

[18] Some stations are authorized to operate only in the daytime or only during certain specified hours. (See Sec. 3.23, Federal Communications Commission Rules and Regulations.)

and because many programs of national interest cannot be produced by single stations with limited resources and remote from talent centers and the scene of national events, the need for chain broadcasting became manifest soon after broadcasting first began in 1920 (NBC R. 40, 41; CBS R. 60, 61).

b. *The National Broadcasting Company.*—In September 1926, the Radio Corporation of America formed NBC as a subsidiary corporation to take over its broadcasting business, including properties purchased at that time from the Telephone Company. To the original three stations (WEAF and WJZ in New York and WRC in Washington) operated directly by, and licensed to, NBC, seven others were added—one each in Washington, Cleveland, and Denver, two in Chicago, and two in San Francisco. All but three of these ten stations operate with power of 50,000 watts, the maximum permitted under the Commission's regulations (NBC R. 52; CBS R. 72). The number of stations regularly on the two NBC networks increased rapidly from 19 in November 1926 to 221 in February 1941. These 221 stations comprised over one-fourth of all the licensed broadcasting stations in the United States (NBC R. 51; CBS R. 71).

Commercial expansion kept pace with physical expansion. The total time sales of the NBC networks amounted to but $3,384,519 in 1927; in 1940 they totaled over $41,000,000. The net income defi-

cit in 1927 is in equally sharp contrast to net income of over $5,800,000 in 1940 (NBC R. 53; CBS R. 73).

At the time these suits were filed, NBC continued to maintain and operate two networks, the "Red" and the "Blue".[19] Each had a separate "basic" network[20] of some 26 stations. In many respects the organizational and operational structures of the Red and Blue networks were intermingled. NBC's affiliation contracts did not specify with which of its two networks a station was to be associated, and since the Red network has consistently been far more profitable than the Blue, this was a matter of serious moment to the affiliates. The properties and accounts of the two networks were not segregated (NBC R. 81; CBS R. 101; Tr. 2560–5). Since the institution of these suits NBC has transferred the Blue network to a new corporation—Blue Network, Inc.—which, like NBC, is a wholly owned subsidiary of the Radio Corporation of America. Three of the 16 stations formerly licensed to NBC have been transferred to the Network, Inc., and a fourth—WMAL in Washi

[19] According to the affidavit of Niles Trammell, NBC President, as of June 1, 1941, there were 70 stations on the "Red," 99 on the "Blue," and 54 available to either (NBC R. 232).

[20] The "basic" network stations are all located in the thickly populated northeastern quarter of the United States. Generally speaking, advertisers are required to purchase at least the "basic" network during evening hours (Affidavit of Niles Trammell, NBC R. 241).

ton, D. C.—has been transferred to the M. A. Leese Radio Corporation (NBC R. 366).

c. *The Columbia Broadcasting System.*—The organization which later became the Columbia Broadcasting System was incorporated in New York on January 27, 1927, although it did not acquire its present name until two years later (NBC R. 57; CBS R. 77; Tr. 2927, 2952).

CBS has never operated more than one network. In 1927, 15 stations comprised the network; by the end of 1940 there were 121 outlets, comprising nearly 15 percent of the licensed broadcasting stations in the United States (NBC R. 59; CBS R. 79). CBS is also the licensee of eight stations, in New York, Washington, Boston, Chicago, Minneapolis, St. Louis, Los Angeles, and Charlotte, N. C. Seven of them operate with power of 50,000 watts, the maximum permitted (NBC R. 59; CBS R. 79).

In 1928 the total time sales of the organization amounted to about $1,400,000; in 1940 they totaled $35,630,063. Net income deficits were sustained during the first two years of operation but never thereafter, and in 1940 CBS's net income exceeded $7,430,000. (NBC R. 60; CBS R. 80.)

d. *The Mutual Broadcasting System.*—The newest national network, Mutual, dates from September 1934. Originally composed of four stations, by the end of 1940 there were 160 stations on the network, comprising about 19 percent of all the

licensed broadcasting stations in the United States (NBC R. 62; CBS R. 82; Tr. Exh. 386). As of January 1940, the network corporation was owned by Station WOR in New York, Station WGN in Chicago, and the Don Lee regional network on the Pacific Coast (each of which owned 25 percent of the network corporation's stock) and by four other broadcasting enterprises (NBC R. 64; CBS R. 84).[21] Station WOR is controlled by R. H. Macy & Co., and Station WGN by the Chicago Tribune (NBC R. 52; CBS R. 72; Tr. Exh. 431, 436, 437).

Although Mutual's commercial growth has also been substantial, its total network times sales remain small as compared to those of NBC and CBS. Total time sales in 1935 of about $1,100,000 had increased by 1940 to some $3,600,000. In general, the stations affiliated with Mutual operate with lower power than those affiliated with NBC and CBS (NBC R. 64; CBS R. 84).

c. *Status of the networks in the broadcasting field.*—The dominant position of the networks in the broadcasting field, and in particular the power and importance of NBC and CBS, were clearly shown by the facts developed at the hearings. As

[21] Six percent of the stock was then held by each of the following: The Colonial Network (a regional network in New England), the United Broadcasting Company (the licensee of stations in Cleveland and Columbus), the Cincinnati Times-Star Company (licensee of WKRC in Cincinnati), and the Western Ontario Broadcasting Company operating station CKLW at Windsor, Ontario, near Detroit.

of the end of 1938,[22] 40 percent of all the licensed broadcasting stations in the United States were affiliated with CBS or NBC. But this by no means fully reflects their stature. The stations affiliated exclusively with NBC utilized over 50 percent of the Nation's total nighttime broadcasting power. The stations affiliated exclusively with CBS accounted for 35 percent of the nighttime power. The stations affiliated exclusively with Mutual accounted for 6.3 percent, and those unaffiliated with any national network used but 2.1 percent of the total nighttime power. (NBC R. 67; CBS R. 87.)[23]

The stations operated by and licensed to NBC and CBS (*supra*, pp. 18, 20) included 14 stations operating on clear channels with the maximum permissible power of 50,000 watts; these 14 comprised almost half the nation's highest-power clear channel stations (NBC R. 67; CBS R. 87).

The proportion of the nation's total broadcasting business handled by NBC and CBS is equally significant. In 1938 the total net time sales for the entire industry amounted to slightly over $100,-

[22] Unless otherwise stated, all figures in this subsection (c) are as of the end of 1938, the date of most of the exhibits in the proceeding before the Commission.

[23] Thirty stations affiliated both with Mutual and with one of the other networks accounted for 5 percent of the total nighttime power. The figures cited are for stations licensed to broadcast for unlimited time, but, as the Report points out, the inclusion of part-time stations would not significantly alter the results (NBC R. 67; CBS R. 87).

000,000. Over $44,000,000, 44 percent of the total, represented network time sales of NBC and CBS. In addition, the stations operated by and licensed to NBC and CBS had net time sales for non-network programs of about $6,735,000.[24] Accordingly, the NBC and CBS networks, and the stations owned or operated by NBC and CBS, accounted for half the total business of the entire industry. In sharp contrast, the net time sales of Mutual for that year were but slightly over $2,000,000, about two percent of the sales of the entire industry. Similarly the consolidated net operating income of NBC and CBS from network programs and from the operations of their own stations totalled over $9,000,000, about half the consolidated net operating income for the entire industry. (NBC R. 68–69; CBS R. 88–89.)

f. *Contractual arrangements between networks and affiliates.*—There are two basic types of programs—commercial programs which are sponsored by advertisers, and sustaining programs, which no advertiser sponsors and from which, accordingly, no advertising revenue is received. Sustaining programs are made available by the national networks to their respective affiliates at no separate charge. Both NBC and CBS maintain studios and program staffs, and produce and offer sustaining programs to their affiliates. Mutual does not itself produce sustaining programs other than news

[24] There are no comparable figures for Mutual, since Mutual neither owns nor operates any stations.

broadcasts originating abroad; instead it selects programs which it considers suitable for its network from among the sustaining programs produced by its affiliates, and arranges for the distribution of such programs to the other stations on its network. Sustaining programs may be accepted or rejected at will by the stations affiliated with the networks. (NBC R. 75–76; CBS R. 95–96.)

NBC and CBS have basically comparable arrangements for compensating their affiliates for carrying network commercial programs. Stated in simplified terms, NBC and CBS affiliation contracts establish a rate for each affiliated station which is charged to the advertiser for the use of that station's time;[25] a portion of the receipts from the advertiser is turned over to the station, and a portion retained by the networks[26] (NBC R. 76–78; CBS R. 96–98; Tr. 1757, Exh. 279, 280).

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[25] The rates charged advertisers for particular stations range from $120 per evening hour for the smaller stations to $1,200 for the "key" stations in New York (NBC R. 77–79; CBS R. 97–99; Tr. 1726–27, 1949).

[26] Stations are remunerated according to a formula based upon the station rate paid by the advertiser. In the case of NBC, for the first 16 "unit hours" of network commercial programs during each 28-day accounting period, a station receives no compensation; for the next 25 "unit hours" it receives 20% of the station rate; for the next 25 "unit hours", 30%; and thereafter 37½%. A "unit hour" is equivalent to one evening hour or two daytime hours, and a Sunday afternoon hour counts as ¾ of a unit hour (NBC R. 76–77; CBS R. 96–97; Tr. 1757).

The compensation arrangements between CBS and its affiliates are similar in principle although they differ rather markedly in detail (NBC R. 77–79; CBS R. 97–99).

The arrangements between Mutual and its affiliates differ from those between CBS or NBC and their affiliates. Mutual has no network rate cards for its stations similar to those of NBC or CBS; it charges advertisers for each station at a rate established by the station itself and over which Mutual has no control. Mutual, however, retains a commission on all proceeds from network programs to cover its overhead expenses, and remits the balance to the affiliates. (NBC R. 79; CBS R. 99; Tr. 4923–4, 4937, 5078.)

Of primary significance in this litigation are six contractual provisions, customarily included in the standard affiliation contract utilized by one or more of the networks, which the Commission found to be against the public interest. The nature and effects of these six provisions are described in the discussion of the regulations which follows.

3. THE CHAIN BROADCASTING REGULATIONS AND THE COMMISSION'S REASONS FOR THEIR ADOPTION

Underlying principles.—While numerous subsidiary problems of policy are necessarily involved, the Commission, in its Report and in its regulations, followed certain underlying principles and policies which are discussed in detail at pp. 46–52, *infra*.

First, that the individual station licensee is the only person responsible under the law for the operation of his station in the public interest.

This responsibility is inherent in the holding of a station license, and may not be divested or transferred to anyone else.[27]

Second, that the Commission is vested by Congress with the duty so to exercise its power as to bring about the widest and most effective use of radio in the public interest.[28]

Third, that such a degree of concentration of control over broadcasting as tends to narrow and restrict the channels of communication and expression or the sources of programs and which excludes important programs from the public is contrary to the public interest and that a free and efficient broadcasting service will best be furthered by a reasonable measure of competition in the broadcast field.[29]

The application of these principles to the facts disclosed by its investigation was the basic consideration of the Commission in formulating the chain broadcasting regulations.

a. *Regulation 3.101—Exclusivity of affiliation.*—Regulation 3.101 (*supra*, p. 5) declares a policy against clauses in affiliation contracts which prevent the affiliate of one network from broadcasting the programs of any other network. In cities where there are fewer than four stations—

[27] NBC R. 88, 97, 101, 102, 117; CBS R. 108, 117, 121, 122, 137.

[28] NBC R. 93, 98, 116–117; CBS R. 113, 118, 136–137.

[29] NBC R. 82–86, 88, 94, 97, 103, 108–109, 111, 118–119, 206, 207–208; CBS R. 102–106, 108, 114, 117, 123, 128–129, 131, 138–139; 25, 27.

the great majority of the cities—such clauses totally exclude the programs of one or more of the existing national networks. In cities with four stations, a new network would be excluded.[30] Each of the basic principles set forth above are violated by such clauses: the stations' freedom to select among available network programs is restricted and a large measure of control over its programs is thus transferred to the network; the public is deprived of opportunity to hear outstanding programs of excluded networks; the fullest use of the radio facilities in each community is prevented, and competition among networks and competition among stations for network service and network affiliation are restrained (NBC R. 71–72, 87–93; CBS R. 91–92, 107–113; Tr. 1854, 1865–6, 8522, 4989, 4921–2, 5477, 5493, Exh. 383, Tr. 5463.)

b. *Regulation 3.102—Territorial exclusivity.*—Regulation 3.102 (*supra*, pp. 5–6) deals with affiliation agreements which prohibit the network from furnishing programs to any other station in the service area of its regular affiliate. Insofar as these clauses merely prevent duplication of programs in the same area, they are unobjectionable. But they have a further effect; even when the

[30] For example, in cities where the Blue Network is excluded, listeners cannot hear the Metropolitan Opera, Lowell Thomas, Raymond Gram Swing, the Boston Symphony, the Town Hall Meeting of the Air, etc.

regular affiliate rejects the program offered by the network, other stations in the community are prevented from broadcasting it.[31] The inclusion of such clauses in contracts between an affiliate and a network, therefore, prevents *other* stations from making the fullest use of their facilities and restrains competition between the affiliate and other stations. Accordingly, Regulation 3.102 declares a policy against the inclusion in affiliation contracts of clauses having such effects (NBC R. 71–72, 93–~~of clauses having such effects. (NBC R. 71–72, 93–~~ 1965–6.)

c. *Regulation 3.103—Duration of affiliation contracts.*—NBC and CBS affiliation contracts commonly bind the station for a five-year period, but the network for only one year.[32] Over a period of five years, the suitability or caliber of the programs of a network may deteriorate, or the necessities of the station and community which it serves may be radically altered. Furthermore, the record shows that NBC and CBS adopted the five-year

[31] The territorial exclusivity arrangement between Mutual and the Don Lee Regional network bars any stations on the Pacific Coast except Don Lee affiliates from receiving Mutual programs, even though such other stations may not be within the service area of any Don Lee affiliate (NBC R. 114–115; CBS R. 134–135).

[32] Apparently NBC has recently abandoned its right to cancel on one year's notice. See Mr. Trammell's testimony in Hearings before S. Committee on Interstate Commerce on S. Res. 113, 77th Cong., p. 462.

term in order to restrain competition among networks and stations for affiliation (*infra*, p. 91). Thus the network was free to shift outlets after a year while the stations could not shift networks until after five years. Regulation 3.103 as originally adopted declared a policy which would prevent the affiliation of a station with a network under a contract for more than one year. After considering a petition for amendment of this regulation, requesting, among other things, affiliation contracts of two years' duration, the Commission, by its Supplemental Report of October 11, 1941, amended the regulation (*supra*, p. 6) to grant that request. (NBC R. 71, 95–98, 205–206; CBS R. 91, 115–118; 24–25; Tr. 2595–8, 1819–20, 1903, Exh. 277 Cl. 1, 278 Cl. 1, 279 Cl. 1, 280 Cl. 15, Tr. 3636–7, 3682–3, 5176.)

d. *Regulation 3.104—Option time.*—The CBS standard affiliation contract contains a provision which gives CBS an option, exercisable on 28 days' notice, on all the time of the station for network commercial programs. NBC affiliates west of Denver are subject to similar option clauses; other NBC affiliates are subject to option clauses which cover 8½ hours, including those between 8 and 11 p. m., which are the best hours for broadcasting purposes. (NBC R. 73; CBS R. 93; Tr. Exh. 277 Cl. 1, Tr. 3602, Exh. 278, 279, 280, 282 Cl. 2, Tr. 3457, 1723, 1800, 3632, 3656–7, Exh. 124 Cl. III.)

These option-time provisions have substantially the same effect in respect of network programs

and competition as the network exclusivity clauses, since the option clauses preclude the affiliates from contracting for any programs of a competing network (within the hours covered by the option) except subject to removal or cancellation should the option be exercised. But the option-time provisions have further restrictive effects which exclusivity does not have, for the option-time provisions can be utilized not only to remove or cancel the programs already contracted for with another network, but also to remove *any* program already scheduled, including local and national non-network programs. Events of local public importance can be planned only subject to the networks requiring their cancellation on 28 days' notice. The further result is that no network affiliate can give a local advertiser a firm commitment for the use of the station's time (within the hours covered by the option) for more than 28 days in advance. The typical option-time clause, accordingly, like the exclusivity clauses, violates each of the basic principles stated heretofore. (NBC R. 72–73, 98–101; CBS R. 92–93, 118–121; Tr., Exh. 670, 665.)

For these reasons, Regulation 3.104 as originally adopted declared a policy against the inclusion of any option-time provision whatever in affiliation contracts. Following consideration of the petition for amendments (*supra*, pp. 13–14), substantial changes were made in this regulation by the Supple-

mental Report (NBC R. 206–211; CBS R. 25–29). Under the amended regulation (see *supra*. pp. 6–7), the broadcast day is divided into three segments, and at least two hours in each segment must be excluded from network option time.[33] It should be noted that even with respect to these hours the regulation does not prevent the *sale* of time to the networks for a program or series of programs. In respect of the hours which may be placed under network option, the Commission sought further to stabilize non-network programs by requiring that network options be exercised on not less than 56 days' notice—double the period contained in current affiliation contracts. In order to prevent these options from restraining network competition, it was further provided that they may not be utilized by one network to remove or cancel programs previously accepted from another network. The Commission found that this arrangement does not materially diminish the usefulness of the option to networks for time-clearance purposes, and at the same time opens the field for competition among network programs (NBC R. 206–211; CBS R. 25–29).

e. *Regulation 3.105—Station rejection of network programs.*—Under present contracts, NBC and CBS affiliates may reject a network commer-

[33] These segments are 8 a. m. to 1 p. m., 1 to 6 p. m., and 6 to 11 p. m.

The hours from 8 a. m. to 11 p. m. comprise what is commonly known as the broadcast day. From 11 p. m. to 8 a. m. three hours may be placed under option.

cial program offered to them for broadcast during the time covered by the network option only if it would be against the public interest to broadcast the program, or if the affiliate desires to substitute a local sustaining program of outstanding importance. With these exceptions, the station licensee is obligated to accept and broadcast the network commercial program, regardless of how it may fit into the station's general program schedule, or of the extent to which it meets the needs of the public which the station serves, or regardless of the fact that a better program may be available at that hour. (NBC R. 74–75, 101–102; CBS R. 94–95, 121–122; Tr. 1795, 1848, 1849, 5132, 1986–8, 5121, 3661, Exh. 124 cl. III, 133, 282 cl. 2, 386.)

Regulation 3.105 (*supra*, pp. 7–8) is a declaration that the licensee must reserve to himself the final responsibility for his programs. The rule declares a policy against affiliation contracts which prevent the station from rejecting network programs offered to it which the station *reasonably believes* to be unsatisfactory or unsuitable. In respect of network programs for which the station has already contracted, the regulation declares a policy against contracts which prevent the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance (NBC R. 74–75; CBS R. 94–95.)

f. *Regulation 3.106—Network operation of stations.*—At the time of the Report, NBC and CBS were the licensees of 18 important and powerful stations in the leading radio markets (*supra,* pp. 18, 20, 22).[34] Operation of stations by networks renders those stations permanently inaccessible to other networks, and in communities where the radio facilities are limited, may operate as a serious restraint upon competition. These considerations are especially applicable where a single network organization operates *two* stations in a single city, as did NBC in New York, Washington, Chicago, and San Francisco at the time of the Commission's Report.[35] Accordingly, Regulation 3.106 (*supra,* p. 8) declares a policy against licensing stations to networks in localities where the existing stations are so few, or of such unequal desirability, that network operation of a station would restrain competition by tending to exclude other networks from the locality; it also declares a policy against licensing more than one station to a network organization in any

[34] On December 23, 1941, the Commission granted the application of NBC for assignment of one of its stations—WMAL in Washington, D. C.—to M. A. Leese Radio Corporation, and for assignment of three of its stations—KGO, WJZ, and WENR—to Radio Corporation of America (NBC R. 366–367). These latter three stations are now licensed to the Blue Network, Inc.

[35] This dual operation is related to NBC's operation of two networks, dealt with in the discussion of Regulation 3.107, *infra,* pp. 34–35.

community. (NBC R. 51–52, 59–60, 102–105; CBS R. 71–72, 79–80, 122–125; Tr. 2030, 1042, 2791–2, 3024, Exh. 274A, 240A.)

g. Regulation 3.107—Operation of more than one network by a single network organization.—Regulation 3.107 (*supra*, pp. 8–9), now suspended, declared a policy against the affiliation of stations with a network organization which operates more than one network. Of the four national networks furnishing programs to the listening public, two, at the time of the Commission's Report, were controlled and operated by NBC. The Commission, including the minority members, found this undesirable. (NBC R. 80–81, 106–109, 162–163, 174; CBS R. 100–101, 126–129, 182-183, 194; Tr. 1042, 1389, 2560–5, 1899, 2373–6, 2188–97, 1923).

The hearing disclosed that NBC's ownership of two networks operated as a buffer against competition from other networks. In several cities where NBC had two outlets—one for the Red and one for the Blue—at least one of the other networks had no outlet at all. Thus there was a restraint not only upon existing networks, but upon any new network which might be formed. In such cities, two of the stations in the city were obtaining their network program service from the same organization. This tended to produce uniformity in program policies, and to exclude new and independent voices from the air. Fur-

thermore, these circumstances tended to produce an undue centralization of control over radio programming.

In its Supplemental Report of October 11, 1941, the Commission reaffirmed the policy embodied in the regulation but it found that there was such unanimity of opinion concerning the desirability of separating the two networks that the separation might be expected to occur voluntarily. (NBC R. 211–212; CBS R. 29–31). Furthermore, the Commission found it desirable to move with caution where the sale of properties of public importance was involved. Accordingly, the regulation was suspended indefinitely and provision was made for adequate notice (a minimum of six months) before it may be subsequently invoked.[35] As we have pointed out above (*supra*, note 7, p. 10), NBC subsequently transferred the Blue Network to a separate corporation owned by its parent, Radio Corporation of America.

h. *Regulation 3.108—Network control of station rates.*—A provision, included only in NBC's contracts, deters its affiliates from setting a lower

[35] Subsequently, the Commission declared that it would observe a similar suspension with respect to that portion of Regulation 3.106 which prevents the operation of two stations in any community by a single network organization, if it could be shown that such operation was indispensable to the continued operation of two networks by a single network organization. See the Minute adopted by the Commission on October 31, 1941 (NBC R. 392; CBS R. 473).

rate for non-network national advertising than the network card rate for the station (NBC R. 79–80, 109–111; CBS R. 99–100; 129–131; Tr. Exh. 133). The record shows that the effect of this provision is to protect network broadcasting from the competitive incursions of transcription broadcasting. At the Commission's hearings the witnesses for NBC frankly conceded that the purpose of this provision was to prevent its affiliates from competing with the network for national advertising (*infra*, p. 114).

Regulation 3.108 (*supra*, p. 9) declares a policy against the inclusion of such clauses in affiliation contracts. NBC has already eliminated this provision from its contracts,[37] and inasmuch as CBS and Mutual never had it, this regulation will operate merely as a bar to the inclusion of such provisions in the future.

SUMMARY OF ARGUMENT

I

A. The Commission has statutory authority to adopt the chain broadcasting regulations under Sections 307 (a) and 309 (a) of the Communications Act which empower the Commission to determine whether the grant or renewal of a station license will serve the "public convenience, interest,

[37] See the testimony of Niles Trammell, NBC president, in Hearings before S. Committee on Interstate Commerce on S. Res. 113, 77th Cong., p. 462.

or necessity" and under Section 303 (i) of the Act which gives the Commission "authority to make special regulations applicable to radio stations engaged in chain broadcasting." The plain language of these provisions authorizes the regulations in question. And the regulations properly apply the statutory standard of the "public convenience, interest, or necessity." That standard authorizes the Commission, in exercising its licensing powers under Sections 307 (a) and 309 (a) and its power to adopt regulations under Section 303 (i), to consider the fact that the licensee applicants operate under arrangements which transfer to others the responsibility for the operation of their stations, which prevent them from making the fullest use of broadcast facilities, which restrict competition among licensees, and which tend to produce an undue concentration of control over broadcasting service.

1. The regulations embody the principle of the Communications Act that the station licensee shall exercise full and final responsibility for the operation of his station and shall not, voluntarily or involuntarily, transfer this responsibility to others. The principle of licensee responsibility is established by Section 301 of the Act which provides that persons operating radio transmission facilities must be licensed; by Section 308 which provides that applications for licenses shall set forth certain facts concerning the qualifications of

the applicant; and by Sections 309 (b) (2) and 310 (b) which forbid the transfer of licenses without Commission approval. The Commission has always enforced the principle of licensee responsibility, recognizing that it is an essential means of preventing evasion of the fundamental requirements of the Act that licenses be issued only to qualified persons upon a showing that they will operate in the public interest and that there should be no undue concentration of control over broadcasting. The investigation on which the instant regulations are based disclosed that the contractual provisions and the practices proscribed in the network regulations unduly restrict the control of licensees over the operation of their stations.

2. The regulations embody the principle of the Communications Act that radio facilities shall be used as fully and effectively as possible in the public interest. The natural limitation on the number of available radio frequencies emphasizes the importance of preserving the maximum use of facilities. The statement in Section 1 that the general objective of the Act is to make available to all the people of the United States a rapid and efficient nation-wide radio service, and the provisions of Section 303 (g) that the Commission shall encourage the larger and more effective use of radio in the public interest clearly indicate that the term "public interest" refers to the interest

of the listening public in the fullest use of radio facilities. The investigation on which the instant regulations are based disclosed that certain restrictive provisions of network affiliation contracts, such as exclusivity, option time, and long term affiliation contracts, improperly limit the ability of licensees to make the fullest and most effective use of the facilities assigned to them.

3. The regulations serve to encourage competition and prevent undue concentration of control in the radio industry. The Commission found that the proscribed provisions of the network affiliation contracts adversely affected the public interest by stifling competition and by creating too concentrated a control of broadcasting in the hands of NBC and CBS.

In forbidding the contractual provisions in question, however, the Commission did not undertake to apply the antitrust laws as such but rather to consider competition as a factor related to the operation of stations in accordance with the standard of the "public convenience, interest or necessity." Appellants' contention that the Commission may not in the exercise of its licensing powers take these matters into account is erroneous in view of the provisions of the Act, its legislative history and administrative construction, and the relevant judicial authorities.

B. The Commission properly embodied its policies in general regulations. Such regulations are authorized in four different places in the Com-

nunications Act—Sections 4 (i) and 303 (f), (i) and (r). Further, the Commission's action constitutes a recognition of the desirability of declaring in the form of general regulations policies designed to guide future administrative action. See *Final Report of the Attorney General's Committee on Administrative Procedure*, S. Doc. 8, 77th Cong., 1st Sess., page 27, and compare *Securities and Exchange Commission* v. *Chenery Corp.*, No. 254, this term, decided Feb. 1, 1943. There is no basis for appellants' suggestion that the regulations are "iron-bound" and constitute an abdication by the Commission of all discretion. Each applicant is entitled to a hearing in which he may show that the policies embodied in the regulations are not appropriate in his particular situation.

II

The facts developed in the administrative record and embodied in the Commission's report make it clear that the regulations have a rational basis, and are not arbitrary and capricious. There is no dispute as to the existence or nature of the underlying facts on the basis of which the Commission found the practices condemned by the regulations to be contrary to the public interest. The claims of CBS and NBC that the application of the regulations would make impossible, or seriously hamper, chain broadcasting operation are without foundation; for network operations have been in the past, and are

now being successfully conducted without recourse to most of the contractual restrictions forbidden by the regulations.

III

The Communications Act, construed as conferring upon the Commission the power to issue the regulations in question, does not delegate legislative power to the Commission in violation of the Constitution. This Court has repeatedly pointed out that the Communications Act and its predecessor, the Radio Act of 1927, declare a policy and establish standards which meet the constitutional requirement. *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266, 285; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 428; *Schechter Corp.* v. *United States*, 295 U. S. 495, 540; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137–138.

The regulations do not constitute censorship or an abridgment of freedom of speech. They are not concerned with program content and do not regulate what may or may not be said on the air. Even if the regulations have an indirect effect on what programs are broadcast, they do not abridge freedom of speech since one of their very purposes is to enlarge the opportunity of access to the radio audience. The mere fact that the industry to be regulated is engaged in the dissemination of news and ideas does not constitute such

regulation a denial of free speech (*Associated Press* v. *National Labor Relations Board*, 301 U. S. 103); nor does the fact that the sanction for breach of the regulations is denial of license imply a denial of free speech, since the natural limitation of the radio spectrum necessitates the licensing system, which has been sustained by this Court. *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266.

IV

In holding that the regulations are valid the court below properly decided this issue on the basis of the administrative record, the pleadings and the motions, without granting a trial *de novo*. It is well established that where adequate administrative hearings are afforded, the reviewing court will not receive additional evidence. *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420; *Acker* v. *United States*, 298 U. S. 426. Such hearings were in fact afforded by the Commission. Adequate notice was given of the issues as to which the Commission desired information and as to which official action was finally taken. And the networks were afforded a full opportunity to present all relevant information. Indeed, the controversy does not concern the primary facts giving rise to the litigation, but rather the ultimate issue as to the effect of the regulations and their wisdom. Appellants had full opportunity to present evi-

dence and argument on these issues in the administrative proceeding.

ARGUMENT

Appellants challenge the validity of the Commission's chain broadcasting regulations on three grounds. First, they deny that the Communications Act gives the Commission authority to adopt the regulations. Second, they contend that the regulations are arbitrary and capricious. Third, they urge that if the Act confers power to adopt the regulations, it unconstitutionally delegates legislative power, and abridges freedom of speech in violation of the First Amendment. Finally, appellants contend that the district court erred in granting the Government's motion for summary judgment. We will take these points up in order.

I

THE COMMUNICATIONS ACT AUTHORIZES THE COMMISSION TO ADOPT THE INSTANT REGULATIONS

By Sections 307 (a) and 309 (a) of the Communications Act of 1934 Congress has delegated to the Commission the task of determining whether the grant or renewal of a station license will serve "public convenience, interest, or necessity." And by Section 303 (i) of that Act, the Commission is authorized "as public convenience, interest, or necessity requires * * * to make special regulations applicable to radio stations engaged in chain

broadcasting." The regulations here attacked were issued pursuant to the authority thus delegated to the Commission.

Appellants challenge the authority to issue these regulations on two grounds; first, as a substantive matter, they deny the Commission's power under either Section 303 (i), or Sections 307 (a) and 309 (a), or both, to prescribe substantive norms of the character here promulgated, and second, as a formal matter; they deny the Commission's authority to impose these standards by regulations rather than by specific orders on applications for licenses or renewals. We submit that neither contention is valid.

The regulations here attacked are "regulations applicable to radio stations engaged in chain broadcasting." Accordingly they are expressly authorized by Section 303 (i), which is plain and unambiguous. Failing any ambiguity in this provision, appellants must sustain the heavy burden of evolving from the statute's context or legislative history implied limitations which negative the Commission's authority.

The only limitations contained in the statute on regulations is that they be in the "public convenience, interest, or necessity." We submit that the standard of "public convenience, interest, or necessity" which is given significance "by its context, by the nature of radio transmission and reception, by the scope, character, and quality of services,"

and by the general objectives of the statute,[28] comprehends the principles which the regulations are intended to implement; i. e., that in exercising its licensing powers under Sections 307 (a) and 309 (a) and its power to adopt regulations under 303 (i), the Commission may take into consideration the fact that a licensee is operating under arrangements or circumstances which transfer to someone else the responsibility for operation of his station; or that he is operating under arrangements which prevent him or other licensees from making the fullest use of broadcasting facilities in the interest of his listening public; or that he is operating under arrangements which restrict competition between him and other licensees and tend to produce an undue concentration of control over broadcasting service.

Although the relevance of each of these principles to the standards by which the Commission must be guided will be discussed separately, it should be noted that they are not mutually exclusive or wholly distinct. The avoidance of concentration of control of broadcasting and the preservation of full opportunity for free expression of viewpoints—which, as will be seen, are cardinal objectives of the Communications Act—are related alike to the principles of licensee responsibility, to that of competition and to that of maximum use of facilities. The principles as here applied reflect a coherent legislative pattern.

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[28] *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266, 285.

A. THE COMMUNICATION ACT OF 1934 AUTHORIZES THE COMMISSION TO PRESCRIBE THE STANDARDS CONTAINED IN THE REGULATIONS.

1. *Licensee responsibility*

The requirement that the station licensee shall exercise full and final responsibility for the operation of his broadcasting station, and that he shall not divest himself, voluntarily or involuntarily, of such responsibility or of the practical measure of control necessary to fulfill it, is a basic feature of the Communications Act. So far as we know, it has never heretofore been questioned; as a matter of administrative practice, the Commission has always adhered to it.

Section 301 of the Act states it to be a purpose of the Act "to provide for the use" of the radio channels "by persons for limited periods of time, under licenses granted by Federal authority." The same section prohibits the *use* or operation of any radio transmission facility by any person except "with a license in that behalf" granted pursuant to the Act. Section 308 provides that applications for licenses shall set forth certain facts concerning the qualifications *of the applicant* to operate the station.

In order to make certain that the licensee shall maintain control of, and continue to assume responsibility for, the operation of his station, Section 309 (b) (2) requires that every license shall contain a statement that neither the license *nor the*

right granted thereunder shall be assigned or otherwise transferred in violation of the Act. And Section 310 (b) prohibits the voluntary or involuntary transfer of a license or of "the frequencies authorized to be used by the licensee, and the rights therein granted," or the transfer of control of a licensee corporation, unless the Commission decides, on the basis of full information, that the transfer is in the public interest and so signifies in writing.

In passing upon individual cases which have come before it, the Commission has repeatedly emphasized that it is the station licensee who is responsible for the conduct of the station and for its operation in the public interest, and has ruled that this responsibility may not be delegated, whether by contract or otherwise, to another.[39] That the principle of licensee responsibility is thus an integral part of the Act's policy and necessarily a relevant standard in determining whether given

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[39] *Replogle*, 1 F. C. C. 256 (1935); *Cole*, 2 F. C. C. 541, 542 (1936); *WCBD, Inc.*, 3 F. C. C. 467, 472 (1936); *Stump*, 3 F. C. C. 560, 564 (1936); *Porter & Eversole*, 4 F. C. C. 680, 682 (1937); *Radio Enterprises, Inc.*, 7 F. C. C. 169 (1939); *Bellingham Broadcasting Co.* (Docket No. 5478, July 18, 1940), 8 F. C. C. —; *Westinghouse Electric & Manufacturing Co.* (Docket Nos. 5823–5826, September 4, 1940), 8 F. C. C. —; *Voice of Brooklyn, Inc.* (Docket No. 1967, October 16, 1940), 8 F. C. C. —; *General Electric Company* (Docket No. 5822, October 22, 1942), 8 F. C. C. —; *Metropolitan Broadcasting Corp.* (Docket No. 4050, June 18, 1941), 8 F. C. C. —.

practices serve the "public convenience, interest, or necessity" can therefore hardly be questioned.

Applying this principle of licensee responsibility to the facts disclosed by its investigation, the Commission concluded that affiliation contracts which bind a station licensee to one network for five years and prevent it from utilizing the programs of other networks go too far in tying the licensee's hands with respect to the sources of program material (NBC R. 95–98; CBS R. 115–118). Similarly, the Commission found that options by which networks can require a licensee to remove any other program to make way for a network commercial program tend unduly to restrict the licensee's freedom with respect to the scheduling of local programs or those of other networks (NBC R. 98–101; CBS R. 118–121).

2. *Maximum use of facilities*

"The number of available radio frequencies is limited" [40] by natural laws. The existence of these physical limitations makes it necessary for the Government to license radio broadcasting. These limitations make waste a public evil; persons who operate radio broadcasting stations must, to fulfill their responsibility, make the best possible use of their stations in order that there may be the maximum

[40] See *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 474.

effective use of the limited radio broadcasting spectrum in the interest of the public." "The Commission is an administrative agency set up by Congress to determine under statutory direction the rights of the people of the United States to have the best possible radio service." [41]

The general objective of the Communications Act, as stated in Section 1 thereof, is "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication service." This provision is supplemented by Section 303 (g) which provides that the Commission shall "study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest." Thus the term "public interest" clearly refers at least to the interest of the listening public in the fullest and most effective utilization of radio facilities.

Pursuant to this principle, the Commission has long required stations to utilize the best available physical facilities appropriate to their operation. Thus, the Commission prescribes minimum hours

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[41] See Second Annual Report, Federal Radio Commission (1928), pp. 169–170, quoted in *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138–139.

[42] *Black River Valley Broadcasts, Inc.* v. *McNinch*, 101 F. (2d) 235, 237 (App. D. C.), certiorari denied 307 U. S. 623.

during which a licensee must maintain program service; it has frequently prescribed the use of power in excess of that requested by an applicant; and it has closely supervised the design of antennae and the selection of antenna sites; all with a view to securing maximum service."[4]

Applying the same principle here, the Commission concluded that certain provisions of network affiliation contracts improperly limit the ability of licensees to make the fullest and most effective use, in the public interest, of the radio facilities assigned to them. As stated in the Commission's Report (NBC R. 117; CBS R. 137):

> Time options adversely affect the ability of licensees to serve the local needs of their communities for program and advertising service. Artificial limitations on the price which licensees may charge national advertisers hamper licensees' efforts to render the best possible program service. * * * Exclusivity provisions which prevent affiliates from carrying the programs of other networks and which prevent any other station within the "territory" of the affiliate from

[4] When CBS acquired exclusive rights to erect transmitting antennae for frequency modulation (FM) broadcasting on Mt. Wilson—by far the best such antenna site in southern California—the Commission required it, as a condition to the grant of a license, to eliminate the exclusive feature of its lease so that others might have opportunity to share in the benefits of the site. *Columbia Broadcasting System, Inc.*, File No. B5-PH-94, July 16, 1941.

obtaining programs from the latter's network, deprive many listeners of the opportunity to hear certain worth-while programs. Long-term affiliation contracts prevent the licensees from bargaining at reasonable intervals for the best network programs.

Such practices whittle away the ability of the licensee to render the best practicable service as effectively as interference with the physical process of transmission."

3. *Preservation of competition and prevention of concentration of control*

The Commission found that the public interest was adversely affected by the curtailment of competition which existing affiliation contracts entail. If found that these contracts have stifled competition among stations for network affiliation and have prevented the benefits to themselves and to the public which would result from a wider and freer choice among network and non-network programs. Similarly, it found that these contractual restraints, together with direct operation by networks of too many stations and with dual network operation by NBC, have resulted in an undue concentration of control in the hands of NBC and CBS over broadcasting, which tends to restrict the opportunities for expression of varying viewpoints and the potential number and variety of program sources. The effect has been, the Commission concluded, to maintain broadcasting at a lower level of public benefit than might be attained under a more fully competi-

tive system with a more substantial degree of control exercised by the licensees themselves.

The appellants apparently do not question the Commission's conclusion that existing network practices impair competition, but contend that the Commission may not take any account of such consequences. It is our position that the Act, its legislative history and long-established administrative construction, and judicial decisions, make clear that the Commission may take into account, in exercising its licensing authority, the preservation of competition and prevention of monopolistic domination of radio broadcasting.

a. *The Act and its Legislative History.*—Section 303 (i) of the Communications Act authorizes the Commission "to make special regulations applicable to radio stations engaged in chain broadcasting." Appellants contend (NBC Br. 63–72; CBS Br. 24–34) that the power conferred by this section must be construed as applying only to the technical matters of radio transmission." In this connection they refer to statements made in the course

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" It is not true as appellants suggest, however (NBC Br. 63–66; CBS Br. 24–26), that the other subsections of Section 303 all relate to technical matters. For example, Section 303 (a) authorizes the Commission to classify radio stations. Section 303 (b) gives the Commission the power to prescribe the nature of the service to be rendered by each class of station and each station within a class. By Section 303 (j) the Commission is given authority to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable. In addition, Section 303 (g), which appeared for the first time in the Communi-

of the debates to show that the problem which concerned the legislators was that the Commission should guard against monopoly of the air resulting from larger stations drowning out smaller ones. This recognition that the Commission has power to guard against monopoly accomplished by technical means tends to disprove rather than prove appellants' point. It is difficult to believe that Congress would have taken pains to prevent monopoly through the use of technical devices while at the same time granted no power to check monopoly accomplished through business arrangements. Certainly there is nothing in the Act to support such a distinction. Monopoly created by lawyers and businessmen is as detrimental to the public interest as monopoly created by radio engineers. Obviously, when Congress concerned itself with monopoly, it concerned itself with the whole problem and not with a single facet.

Moreover, there is no basis for appellants' contention that the legislative history indicates that

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cations Act of 1934, authorizes the Commission to study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest. As the court below stated (NBC R. 524-525; CBS R. 486):

"We can see no reason for confining the last clause [of Section 303 (g)] to scientific or engineering problems; the purpose is apparent to give the Commission power to foster the industry in all appropriate ways. It is not clear that this was a new purpose; but if it was, it infused the powers already granted in an earlier act, broadening them in accord with a changed outlook—the power granted under subdivision 'i' among the rest."

Congress was concerned *only* with "monopoly" resulting from electrical interference. In fact, the contrary is true.

The provision which is now Section 303 (i) was carried over verbatim from Section 4 (h) of the Radio Act of 1927. There it first appeared as a Senate Committee amendment to the House bill (H. R. 9971, 69th Cong.) which became the 1927 Act. It then read:

> (C) the commission, from time to time, as public convenience, interest, or necessity requires, shall * * *
>
> * * * * * *
>
> (j) When stations are connected by wire for chain broadcasting, determine the power each station shall use and the wave lengths to be used during the time stations are so connected and so operated, *and make all other regulations necessary in the interest of equitable radio service to the listeners in the communities or areas affected by chain broadcasting.* [Italics supplied.]

The report of the Senate Committe on Interstate Commerce (Report No. 772, 69th Cong., 1st sess., p. 3) stated that under this bill:

> The commission * * * is given complete authority—
>
> * * * * * *
>
> (j) to control chain broadcasting.

The bill passed the Senate in this form. The conference committee revised the section and re-

ported it back in the more general and flexible form in which it now appears."[15]

As the court below pointed out in its opinion (NBC R. 524; CBS R. 485–486), it would be altogether unwarranted to assume that the general form of the section as finally enacted was intended to adopt only the first clause of subsection (j) which authorized the Commission to determine the power and wave lengths of stations engaged in chain broadcasting, and abandon the second clause which authorized the Commission to make all other regulations necessary in the interest of equitable radio service to the listeners in the communities or areas affected by chain broadcasting.[16]

That Section 303 (i) is not limited to technical matters, but comprehends other forms of regulation directed to the problems of monopoly, is apparent as well from the Senate debates on the conference report on the 1927 bill, where the following

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[15] The conference reports contain no explanation for the change in form, but merely state that the jurisdiction conferred by Section 4 as revised is substantially the same as the jurisdiction conferred upon the Commission by Section 1 (C) of the bill as amended in the Senate. See S. Doc. 200, 69th Cong., 2d sess., p. 17; H. Rept. 1886, 69th Cong., 2d sess., p. 17.

[16] The position taken by the appellants is essentially that, in applying the public interest standard, the Commission is limited to considering physical and technical matters, and perhaps the "moral" and financial qualifications and prior experience of applicants. They construe Section 303 (i) as empowering the Commission to regulate only the engineering aspects of chain broadcasting operations by stations. As a corollary, the appellants dismiss matters pertaining to

illuminating colloquy took place (68 Cong. Rec. 2881):

> Mr. BROUSSARD. * * * I received this morning a telegram from Shreveport, La., signed by Mr. W. K. Henderson, who is a very wealthy man there, and who has a broadcasting station which he uses mostly to entertain his friends and to accommodate the public. I do not think he is making anything out of it. His telegram reads:
>
> SHREVEPORT, LA., *January 31, 1927.*
> Hon. EDWIN S. BROUSSARD,
> *United States Senate*:
>
> Our Shreveport Times this morning carried headlines of 35 stations to be chained together. Just as I wired you the other day, chain stations will monopolize and independent stations, such as we have at Shreveport, are practically done for. Hope you will give bill considerable study

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competition or concentration of control as outside the Commission's ken.

As we have noted (*supra*, note 44), the other subdivisions of Section 303 are not limited to technical matters. And the view thus urged sits uneasily beside this Court's pronouncements that the Communications Act is a "supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out the legislative policy," that Congress moved under the "spur of a widespread fear" of monopolistic domination of broadcasting and sought to maintain "a grip on the dynamic aspects of radio transmission," and that the broadcasting field is one "of free competition." *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137; *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 474.

and stand for interest of others beyond Radio Corporation of America who control chain stations. Between American Telephone & Telegraph Co. and Radio Corporation of America and other interests the independents are through.

W. K. HENDERSON,
Owner, Radio Station KWKH.

I should like to have the Senator from Washington cover the suggestion contained in telegram, and if the bill does actually make this impossible, to make that known to the Senate.

MR DILL. I am very glad the Senator from Louisiana has asked the question. It gives me an opportunity to explain not only that but some things regarding what the Senator from Nevada said.

In the first place, under this bill chain broadcasting today, concerning which the writer of the telegram is concerned, is absolutely without any regulation. We have no law today to handle the situation, and the various radio organizations, including the Radio Corporation of America and the American Telephone & Telegraph Company, are going ahead and building up the chain stations as they desire without let or hindrance and without any restrictions, because the Secretary of Commerce has no power to interfere with them. Unless this proposed legislation shall be enacted they will continue to do so, and they will be able by chain-broadcasting methods practically to obliterate the

independent small stations, as the man who wrote the telegram suggests.

While the commission would have the power under the general terms of the bill, the bill specifically sets out as one of the special powers of the commission the right to make specific regulations for governing chain broadcasting. As to creating a monopoly of radio in this country, let me say that this bill absolutely protects the public, so far as it can protect them, by giving the commission full power to refuse a license to anyone who it believes will not serve the public interest, convenience, or necessity. It specifically provides that any corporation guilty of monopoly shall not only not receive a license but that its license may be revoked; and if after a corporation has received its license for a period of three years it is then discovered and found to be guilty of monopoly, its license will be revoked.

In addition to that——

Mr. HEFLIN. Mr. President——

Mr. DILL. Just a moment. In addition to that, the bill contains a provision that no license may be transferred from one owner to another without the written consent of the commission, and the commission, of course, having the power to protect against a monopoly, must give such protection.

I wish to state further that the only way by which monopolies in the radio business can secure control of radio here, even for a limited period of time, will be by the commission becoming servile to them. Power

> must be lodged somewhere, and I myself am unwilling to assume in advance that the commission proposed to be created will be servile to the desires and demands of great corporations of this country.

Senator Dill was in charge of the bill in the Senate and his remarks were addressed to the chain broadcasting provision in its final form. In the excerpt quoted above, he makes several points worthy of note:

(1) That the Commission could regulate chain broadcasting under its general powers even without this specific authorization.

(2) That the Commission was, however, given the power "to make specific regulations for governing chain broadcasting."

(3) That the Commission was expected to use its powers so as to protect the public against monopolies.

Thus, the Congressional intent is clear. It was specifically contemplated that, while the enforcement of the antitrust laws was not vested in the Commission, the Commission would, in exercising its powers, take into consideration the policy of those laws; and authority to regulate chain broadcasting was given to the Commission with this end consciously in mind.[47]

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[47] In an attempt to rebut the clear statement by Senator Dill, which is quoted in the text, both NBC (Br. 77) and CBS (Br. 67) rely upon a colloquy between Senators Dill

The appellants urge (NBC Br. 45–56; CBS Br. 55–61) that since Congress in Section 311 of the Communications Act expressly authorized the Commission to refuse licenses to persons who have been convicted of violating the antitrust laws, it by implication deprived the Commission of any jurisdiction to consider questions pertaining to competition or monopoly in exercising its licensing powers unless the applicant has already been found guilty by a court of violating the antitrust laws. This contention misapprehends the function of the Commission in administering the Communications Act. The Commission does not apply the antitrust laws as such. Rather, as it stated in its Report (NBC R. 82; CBS R. 102):

> The prohibitions of the Sherman Act apply to broadcasting. [And] This Commis-

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and Pittman which occurred two days later and which appears at 68 Cong. Rec. 3034. However, the excerpt which they quote has been torn from its context. When read in context, it is apparent that the Senators were discussing the Commission's powers and sanctions for preventing discrimination in the allocation of radio time to candidates for office. The discussion must be read in the light of the fact that at that time Section 14 of the Bill (which ultimately became Section 14 of the Radio Act of 1927) recognized the supposed jurisdiction [but *cf. Sta-Shine Products Co. v. Station WGBB*, 188 I. C. C. 271] of the Interstate Commerce Commission to hear and determine complaints of discriminatory or unreasonable practices by broadcasters. That the Radio Commission was not foreclosed from considering such matters in the exercise of its licensing power, however, is apparent from the observations of Senator Dill almost immediately after the colloquy cited by appellants (68 Cong. Rec. 3035–3036).

sion, although not charged with the duty of enforcing that law, should administer its regulatory powers with respect to broadcasting in the light of the purposes which the Sherman Act was designed to achieve.

In the Sherman Act, as well as in a number of other statutes [15] Congress has established a policy of discouraging monopoly and fostering free and fair competition in economic activity generally. Radio broadcasting is within the ambit of the antitrust laws and is therefore subject to the standards and sanctions which they prescribe. But the fact that Congress has made available judicial sanctions for the effectuation of the policy of fostering free and fair competition, as it is embodied in other legislation, in no way detracts from the Commission's duty under the Communications Act to consider that policy in exercising its power to grant licenses or promulgate regulations in accordance with the "public interest, convenience, or necessity." Cf. *United States* v. *Lowden*, 308 U. S. 225; *Interstate Commerce Commission* v. *Railway Labor Executives Assn.*, 315 U. S. 373. On the contrary the Commission is obliged, in giving substance to the standard of "public convenience, interest, or necessity," to be guided by congressional policy with respect to fostering competition so far as it is applicable to

[15] See e. g. Federal Trade Commission Act, 38 Stat. 717, 52 Stat. 111, 15 U. S. C. 45, et seq.; Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. 13 et seq.

the subject matter within the Commission's jurisdiction. Cf. *United States* v. *Lowden*, 308 U. S. 225; *Interstate Commerce Commission* v. *Railway Labor Executives Assn.*, 315 U. S. 373.

Here, by Sections 311 and 313 Congress went out of its way specifically to make the antitrust laws applicable to the radio broadcasting industry. Examination of the Act as a whole further points to the congressional intention that the requirement of free competition be applied in the radio field. In Section 3 (h) of the Act, Congress provided that persons engaged in radio broadcasting shall not be deemed common carriers. By Section 313 it explicitly made the antitrust laws applicable to persons engaged in radio communication, and authorized the courts to revoke the license of any person found guilty of violating the antitrust laws. In Section 311 it directed the Commission to refuse a license to any person whose license has been revoked by a court under Section 313, and authorized the Commission to refuse a license to any person found guilty by a federal court of having violated the antitrust laws with respect to radio communications. By section 314 it forbade persons engaged in radio communications from engaging in communication by wire, or vice versa, if the effect thereof will be substantially to lessen competition or to restrain commerce. These elaborate provisions leave no doubt that Congress intended to adopt the policy

of free competition for the radio broadcasting industry.

Yet appellants urge that the fact that the Commission is thus authorized by the Communications Act itself to refuse to grant a license or a renewal to persons judicially found to have contravened that policy, as it is formulated in the antitrust laws, implies that in the absence of such judicial finding the Commission must give no consideration to the effects of monopoly or unduly restricted competition, in exercising its licensing and regulatory authority. Even the absence of that provision in the Act would leave grave doubt that Congress intended that the freedom from monopoly and unreasonable restraints on competition which pervades our legal norms should not be embodied in the conception of the "public interest" which must guide the Commission. Its presence, and the other provisions of the Act adverted to above, point to the opposite conclusion. Cf. *Chesapeake & Ohio Ry.* v. *United States*, 283 U. S. 35. At the very least, however, Section 311 which was designed to implement the Commission's licensing power (see *infra*, pp. 64–67) cannot, as appellants contend, be construed to limit that power.

Nor does the construction of the Act here urged render superfluous that portion of Section 311 which authorizes the Commission to refuse a license to a person who has been adjudged guilty of an antitrust law violation. The section, in

the form in which it was enacted in the Radio Act of 1927, was mandatory and directed the Commission to refuse a license to any person who had been adjudged guilty of an antitrust law violation in the radio field (Section 13 of the Radio Act of 1927). Under the Radio Act, accordingly, no argument of superfluity could have been made. The provision was amended to its present form when it was carried into the Communications Act in 1934." Senator Dill, the manager of the bill in the Senate, stated that the change "was one which was insisted upon by certain organizations, and it seemed fair to the committee to do that" (78 Cong. Rec. 8825). Obviously, it seemed fair because the antitrust

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" The Senate Committee report explained the change thus (S. Rept. 781, 73d Cong., 2d sess., p. 7):

"The effect of the alteration is to bring section 311 more closely into harmony with section 313. If the court revokes a license, the Commission should not grant an application for another license to the same parties. If, however, the court has adjudged the person guilty, but has not revoked the license, the Commission can determine whether or not public interest will be served by the granting of a license."

Thus the one change which has been made in the relevant portions of the Act since their adoption in 1927 was to increase the Commission's discretion as to what to do in the event of violation of the antitrust laws. And it was intended that the Commission should consider the violation from the standpoint of "whether or not public interest will be served by the granting of a license." Thus, again, the Commission was not to apply the antitrust laws as such, but was to consider particular violations of the antitrust laws as they had bearing upon the matters which were entrusted to the Commission.

law violation might conceivably bear no relation to the broadcasting operation. But certainly it cannot be seriously argued that in making this amendment in 1934 Congress intended to alter the entire theory of the 1927 Act by reading competition out of the public-interest standard.[80]

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[80] The specific grants of authority to the Commission contained in Sections 215 and 602 (d) of the Act (See CBS Br. 38; NBC Br. 50–51) with respect to competition among common carriers in no way negative the intent of Congress that the Commission should take into account the policy of the antitrust laws in exercising its licensing powers. Neither of these provisions was in the Radio Act of 1927. They appeared in the Communications Act of 1934 where for the first time the Commission was given jurisdiction over common carrier matters.

Section 215 directs the Commission to investigate: the transactions of common carriers relating to the furnishing of equipment, research services, finances, and personnel; the furnishing of telegraph services by telephone companies, and vice versa; and exclusive dealing contracts of common carriers. Section 602 (d) is an amendment to Section 11 of the Clayton Act which from the time of its enactment in 1914, authorized the Interstate Commerce Commission to enforce certain provisions of that Act with respect to common carriers. When, in 1934, jurisdiction over common carriers by wire and radio was transferred to the FCC, this section of the Clayton Act was amended to give the FCC power to enforce these provisions of the Clayton Act with respect to the carriers under its jurisdiction. Similar authority has been given to other governmental agencies.

The power of the Federal Communications Commission in acting on broadcast licenses, to consider matters pertaining to competition in applying the public-interest standard, was present in full force in the Radio Act of 1927, which gave the Radio Commission no common carrier functions whatsoever. Therefore, the Commission's specific authorization to con-

Section 311 in its present form serves, in the regulatory scheme which the Commission administers, to eliminate the necessity for retrying the antitrust suit in proceedings involving the issuance or revocation of licenses. It enables the Commission to accept as final and determined the facts pertaining to restraints on competition where a conviction has been obtained, without the necessity of establishing such facts or such restraints at its own hearing; the Commission's function is then to determine whether in view of those facts and the particular restraint as found by the court the public interest, convenience or necessity requires the grant (or denial) of a particular license application. As the court below pointed out (NBC R. 526–527; CBS R. 488):

> We construe this clause of sec. 311 as going no further than to provide the Commission with an estoppel as to any facts which a court may have found; these may be taken as data for any rational inference that can be drawn from them relevant to the ultimate issue; but "guilt" as "guilt" is not the ultimate issue. Certainly that is the only effect which it is necessary to give the clause; there is not the slightest

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sider matters relating to competition in connection with common carriers—which authorization was given to the Commission at the same time that it was given jurisdiction over common carrers—cannot detract from its general and previously existing power to consider competition in connection with its radio broadcast licensing function.

> warrant for inferring that in the absence of an adjudication, the Commission may not determine what has been an applicant's past conduct, or may not consider how far, if repeated, it would interfere with the fullest use of his license. Whatever may be the mysteries enveloping an adjudication of "guilt" under the Anti-Trust laws which make that issue unfit to be entrusted as such to profane hands, the Commission is certainly peculiarly competent to appraise the effect upon broadcasting of restrictive or monopolistic practices, and is as competent to decide whether an applicant is likely to engage in them as it is to decide any of the other issues which come before it.

Appellants (NBC Br. 58–62; CBS Br. 61–66) also seek to rely on the fact that various bills which preceded the Radio Act of 1927 proposed to empower the Secretary of Commerce to determine whether the antitrust laws were being violated, and if so, to refuse a license to the violator. They point out that Secretary Hoover opposed these provisions on the ground that it would be inappropriate for an administrative official to determine complicated questions pertaining to the antitrust laws. This, however, is quite beside the point. As CBS points out in its brief (p. 63), one of the principal matters pertaining to "monopoly" with which Congress was concerned at that time was the patent pool between AT &

T, GE, and RCA, involving patents for radio tubes and other equipment. It was quite natural that Secretary Hoover should oppose being burdened with the task of determining whether this very complicated factual situation involved an antitrust law violation, and quite natural that he was successful in persuading Congress that such a decision should be left to the courts.

Examination of the entire Act and its legislative history thus discloses that Congress intended the Commission, in applying the public interest standard, to consider the implications (for the fullest and most effective use of broadcasting facilities) of monopoly, concentration of control, and other restraints on competition in the industry.[51]

b. *Administrative construction.*—In accordance with this legislative authorization, the Commis-

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[51] Appellants make the further contention (NBC Br. 91; CBS Br. 71–79) that even if the Commission can take competition into account, it exceeded its statutory authority in this case because the Commission mistakenly believed that it was its duty to compel competition regardless of its effect on the listening public and on the industry. This argument is simply without foundation. In fact, it is evident from the Commission's report that quite the contrary is true (NBC R. 93, 95, 97, 98, 101, 102, 111, 113; CBS R. 113, 115, 117, 118, 121, 122, 131, 133). The Report clearly shows, as the court below found, that "Each regulation was a specific exercise of power addressed to a particular practice which interfered with the most 'effective use of radio in the public interest'" (NBC R. 528; CBS R. 489).

sion has consistently adhered to the view that it should exercise its licensing and other powers so as to prevent monopoly and foster competition. In several instances it has granted or refused consent to a transfer of control of a station accordingly as competition would be increased or diminished. *Western Broadcast Company*, 3 F. C. C. 179 (1936); *Memphis Commercial Appeal Co.*, 6 F. C. C. 419 (1938). Often it has refused, on account of the monopoly or competitive factor, to grant a license or to consent to a transfer which would result in ownership of two stations in a given community by a single licensee.[52] Also, the Commission has given consideration to the furtherance of competition by giving preference to a non-newspaper applicant over a newspaper applicant.[53] Finally, the Commission, in granting an application for a construction permit for a second station in a community, has stressed the

[52] *WSMB, Inc.*, 5 F. C. C. 55 (1938); *Genesee Radio Corp.*, 5 F. C. C. 183 (1938); *Louisville Times Co.*, 5 F. C. C. 554, 558–559 (1938); *Colonial Network, Inc.*, 5 F. C. C. 654 (1938); *El Paso Broadcasting Co.*, 6 F. C. C. 86, 106–107 (1938); *Carolina Advertising Company*, 6 F. C. C. 230 (1939); *Coryell, Sr., and Coryell, Jr.*, 6 F. C. C. 282 (1938); *Citizens Broadcasting Corp.*, 6 F. C. C. 669 (1938); *Portland Broadcasting System, Inc.* (*WGAN*), File No. B1-P-2912, October 28, 1940, 8 F. C. C. ——; *South Bend Tribune*, File No. B4-P-900, March 1, 1941, 8 F. C. C. ——.

[53] *Port Huron Broadcasting Company*, 5 F. C. C. 177 (1938); Proposed Findings, *Stephenson* (Docket Nos. 5779 and 5870, March 31, 1941), 8 F. C. C. ——.

benefit to be expected by the community from this creation of competition."[44]

In the new fields of frequency modulation (FM) and television broadcasting the Commission has by regulation sought to avert monoply or undue concentration of control. Commission Regulation 3.230 declares a policy against licensing more than one frequency modulation station in any community, or more than six such stations altogether, to one applicant. Regulation 4.226 declares the same policy with respect to television stations, except that the latter limitation is fixed at three stations.

It is thus clear that consistently and extensively the Commission has interpreted the standard "public convenience, interest, or necessity" in the light of the congressional intention that the policy against monopoly and other restraints on competition shall apply to the field of radio broadcasting. These interpretations are of considerable weight in determining the meaning of the standard, "public interest, convenience, or necessity" contained in the Act. Cf. *Norwegian Nitrogen Products Co.*

[44] Proposed Findings, *Presque Isle Broadcasting Company* (Docket No. 5426, January 25, 1940), 8 F. C. C. ——. The Commission said: "A second broadcasting station located in Erie would compete with Station WLEU for the patronage of advertisers and for listening audiences. The competition between two local broadcasting stations would be expected to result in improvements in each and corresponding benefits would thus be received by members of the listening public. It is apparent that such competition will promote public interest."

v. *United States*, 288 U. S. 294, 315; *United States* v. *American Trucking Associations*, 310 U. S. 534, 549.

c. Judicial decisions.—Even in the absence of legislative and administrative evidence pointing to the relevance of free and fair competition to the "public interest, convenience, or necessity," that factor has an obvious pertinence where the "public interest" requires the fullest and most effective use of limited facilities. Cf. *Chesapeake & Ohio Ry.* v. *United States*, 283 U. S. 35.[55] In the instant

[55] In that case, a railroad had applied to the Interstate Commerce Commission for permission to extend its railroad line, and the statute (Section 1 (18) of the Interstate Commerce Act) directed the Commission to issue a certificate for the construction only if the "public convenience and necessity" so required. The Commission issued the certificate solely on the ground that "competition between carriers and competitive service to shippers" would result (p. 38); and the suit challenged the Commission's authority to issue the certificate upon that basis. Nothing in this portion of the Interstate Commerce Act expressly suggested that competition should be taken into account, but this Court held that the Commission correctly relied on that consideration. Furthermore, in that case, as in this one, there was a wholly distinct section of the Act in which competition was expressly referred to, to wit, Section 5 (4) of the Interstate Commerce Act, which directed the Commission to prepare a plan for the consolidation of railway properties with the direction that under the plan "competition shall be preserved as fully as possible." There, as here, it could have been argued that the express reference to competition in one portion of the Act forbade its implication in another portion, but the Court drew exactly the opposite conclusion, and found support for its decision under Section 1 (18) in the language of Section 5 (4).

case the history and administration of the Act do not leave to inference the conclusion that the fostering of competition in radio broadcasting has bearing on the "public interest, convenience, or necessity." And this Court has on more than one occasion recognized that the preservation of free competition and the preventing of monopoly in broadcasting were cardinal objectives of Congress in enacting the Communications Act of 1934. Thus, in *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, where it held that the Commission might license a new station despite economic loss which would thereby be occasioned to an existing station, this Court pointed out (pp. 474–475):

> Thus the Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition, as it has done in the case of railroads, in respect of which regulation involves the suppression of wasteful practices due to competition, the regulation of rates and charges, and other measures which are unnecessary if free competition is to be permitted.

And the Court concluded (p. 476):

> If such economic loss were a valid reason for refusing a license this would mean that the Commission's function is to grant a monopoly in the field of broadcasting, a

result which the Act itself expressly negatives * * *."

Similarly in *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137, it was recognized that:

> Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field. To avoid this Congress provided for a system of permits and licenses. * * *

"Basing their contention on a phrase from the opinion in the *Sanders* case—"But the Act does not essay to regulate the business of the licensee"—the networks argue (NBC Br. 52–53; CBS Br. 42, 52) that the Commission has no jurisdiction over the contractual relations between licensees and networks because they are "business" practices and policies beyond the pale of Commission action. The argument, however, misconstrues the language of the opinion. The meaning of the phrase is that the Commission has no such authority to regulate the business practices of broadcast licensees as it has in the case of common carriers. Thus the Commission cannot regulate the rates of broadcast licensees, prescribe a uniform system of accounts, or the like. But this no way suggests that the Commission, in exercising its licensing function, must ignore practices which frustrate the Act's objectives, merely because those practices pertain to the "business" of the licensee. Indeed, the opinion in the *Sanders* case itself, as appears from the quotations above, makes it clear that the Commission is not so restricted. Any other conclusion would make it impossible for the Commission to maintain, through appropriate administrative action, a grip on the "dynamic aspects of radio transmission" and to foresall "monopolistic domination in the broadcasting field." *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137–138.

Indeed, the "public interest" in preserving free competition in the field of radio broadcasting is emphasized by the physical character of broadcasting operations. As this Court has recognized, the existence of physical conditions which restrict economic opportunity in a given field accentuates the need for preventing the superimposition of artificial restraints in that field. *Cf. United States* v. *Terminal Railroad Association of St. Louis*, 224 U. S. 383, 405. The physical nature of the radio spectrum limits the number of radio stations, and consequently the number of outlets available to networks in the various radio markets. These inherent extrinsic limitations on broadcasting possibilities restrict the area of competitive opportunity in the field, and by that very token make "it the more important that such opportunities as may exist for fair competition should not be impaired." *Sugar Institute, Inc.* v. *United States*, 297 U. S. 553, 600.

B. THE COMMISSION PROPERLY EMBODIED ITS POLICIES IN GENERAL REGULATIONS

Appellants argue (NBC Br. 78–88; CBS Br. 49–50) that even if the Commission does have the power to deny a license or a renewal on the ground that a particular affiliation contract prevents an individual station from operating in the public interest, the Commission was nevertheless without power to issue rules and regulations of general applicability. This contention is in fla-

grant disregard of numerous express provisions of the Act."[51]

Section 4 (i) declares:

> The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

Section 303 provides that—

> the Commission from time to time, as public convenience, interest, or necessity requires, shall—

* * * * *

[51] The cases cited by NBC (Br. 79–85) do not support its contention. In *Waite* v. *Macy*, 246 U. S. 606, the regulation at issue made the presence of coloring matter, even coloring matter which was not impure, an absolute ground for exclusion whereas the statute prescribed the presence of impurities as the basis for exclusion. The Court held that the particular regulations of the Tea Board were unreasonable; it did not hold that the Tea Board lacked authority to issue general regulations. In *Work* v. *Mosier*, 261 U. S. 352, the statute under which the Secretary of the Interior purported to make the regulation did not confer on the Secretary any rule-making power. In *Steinmetz* v. *Allen*, 192 U. S. 543, the regulation promulgated was inconsistent with the statute which had been previously interpreted by the courts to permit, in a proper case, the joint application which the Patent Office proposed to prohibit absolutely. In *Miller* v. *United States*, 294 U. S. 435, while the compensation provisions of the Act expressly provided that the loss of one hand and the sight of one eye was to be conclusively deemed total permanent disability, no such provision was made in the insurance section contemporaneously

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act * * *;

* * * * *

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

* * * * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act. * * *

Thus the Act, not once but four times, gives the Commission a general authorization to issue regulations; and specifically gives it authority to issue regulations in the field of chain broadcasting.

Even aside from these explicit provisions, the Commission would probably have authority to issue regulations under the general authorizations contained in Section 4 (j) "to conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." Certainly it would seem that it would expedite business and further the ends of justice for an administrative body to formulate

enacted. The regulation was thus held invalid because there was evinced a congressional intent that no such conclusive presumption was to be applicable in the administration of the insurance provisions of the act.

in general terms the policies which it proposes thereafter to follows. See *Final Report of the Attorney General's Committee on Administrative Procedure,* S. Doc. 8, 77th Cong., 1st sess., p. 27; and compare *Securities & Exchange Commission* v. *Chenery Corp.,* No. 254, this Term, decided Feb. 1, 1943.

Nor is there any basis for the suggestion (NBC Br. 87; CBS Br. 49) that the regulations are "iron bound" and constitute an abdication by the Commission of all discretion. The Commission must apply the statutory standard of public interest, convenience, or necessity to each application for a license in the light of the facts pertinent to the application. Each applicant (unless his application is granted without a hearing) is entitled to a hearing not only that he may have an opportunity to show that he is entitled to a grant of an application under the established policies of the Commission, but also that he may show, if necessary, that such policies are not appropriate in his particular situation. In fact, the Commission has adopted rules for the specific purpose of protecting the rights of such applicants in enabling them to make such a showing if they can (Sections 1.72 and 1.81)."

* * * * *

" *Federal Communications Commission* v. *National Broadcasting Company (KOA)*, No. 585, this Term, certiorari granted January 18, 1943, is a good example of a case where

To conclude—the system of broadcasting regulation established by the Communications Act finds few parallels abroad, where broadcasting is usually a government monopoly, or is monopolized by huge quasi-public corporations operating under rigid governmental supervision (Huth, *La Radiodiffusion Puissance Mondiale, passim*). Congress might have travelled all or part way down that road. At any time during the last decade or more, Congress might have determined to treat the networks as the major responsible units in the broadcasting field, and thus have moved in the direction of regulated monopoly or quasi-monopoly.

But Congress has chosen a different means of promoting a free and efficient broadcasting service of maximum public usefulness. The context of the Act and its legislative history demonstrate Congress' unwillingness to contemplate a monopoly or near-monopoly, or to embark on the detailed regulation which such a structure would require. Instead, strong reliance was placed on competition as an incentive to effective public service and responsibility for serving the public interest was reposed squarely and commandingly on the many station licensees; and specific man-

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the Commission granted an application which did not comply with its allocation rules when the applicant was able to show that public interest would be served by not adhering to the regulation.

dates prohibit the shifting of that responsibility to other shoulders, lest the concentrated power which Congress feared should develop by a process of accretion.

II

THE REGULATIONS ARE REASONABLE

The validity of administrative regulations depends not only upon the statutory authority to issue them, but also upon their reasonable relation to the statutory objectives. The scope of the issue concerning reasonableness is narrow. The judicial inquiry is at an end if there is found a rational relation of the regulation to the statute, and to the ends sought to be achieved; the question is whether the particular alternative which the Commission selected among many alternatives to achieve the objectives of the Act is one which, in the circumstances, a rational person could have chosen. Cf. *Final Report of the Attorney General's Committee on Administrative Procedure*, S. Doc. 8, 77th Cong., 1st Sess., pp. 116, 117, 119. Only if the regulations are unreasonable, arbitrary, or capricious will they be set aside. *American Telephone and Telegraph Co.* v. *United States*, 299 U. S. 232, 236–237; *Pacific States Box & Basket Co.* v. *White*, 296 U. S. 176, 182; *Chicago, R. I. & P. Ry.* v. *United States*, 284 U. S. 80, 95–96; *Houston* v. *St. Louis Independent Packing Co.*, 249 U. S.

479, 484, 487.[39] And, as the court below observed (NBC R. 530; CBS R. 491), the doctrine of administrative finality applies with "special force" when the judgments involved in promulgating regulations are necessarily prospective. Cf. *Railroad Commission of Texas* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, 581; 311 U. S. 570, 575–577. Here the basic disagreement among the parties relates to the future effect of the regulations; the resolution of the conflicting contentions is within the particular competence of the Commission charged with dealing with these matters.

The test of reasonableness is squarely met by the instant regulations. The essential facts of the business and practices of network broadcasting, summarized above (pp. 15–36) and fully described in the Commission's report are not in dispute. Those facts establish the dominance of the appellant networks in the field of broadcasting, and the Commission, upon its plainly reasonable finding that dominance exists (NBC R. 66–70; CBS R. 86–90), was further warranted in concluding (NBC R. 82–115; CBS R. 102–135) that

[39] Indeed, in passing upon the validity of administrative regulations, this Court has even invoked a presumption of the existence of facts to support the regulations. *Pacific States Box & Basket Co.* v. *White*, 296 U. S. 176; *United States* v. *Rock Royal Co-operative*, 307 U. S. 533, 567–568; *St. Joseph Stockyards Co.* v. *United States*, 298 U. S. 38, 83 (Brandeis, J., concurring).

the dominance leads to an undue restriction of stations in their choice of programs, to impairment of competition between stations, to limitation upon the development of other than appellant networks, and their ability to render public service, and to depriving the listening public of other network or local programs. Such results fully support the conclusion that the existing practices are not in the public interest. The salutary effect of competition is lost; local and community interests tend to be sacrificed to national and business considerations which are normally given almost absolute priority; and affiliated stations lose a large degree of their independence.

These evils justify the Commission's remedial action. The facts and the reasonable conclusions relating to the effects of these facts warrant regulations designed to ameliorate the evils. We submit that the particular remedial regulations which the Commission chose are appropriately shaped to achieve this purpose. The regulations are in harmony with, and further, the basic statutory principles of station responsibility, of maximum use of facilities, and of preservation of competition and prevention of concentration of control.

While we shall examine each of the regulations individually, it should be noted that they cannot be appraised *in vacuo*. The various practices considered by the Commission do not

operate in isolation but rather, as the Commission found (NBC R. 111; CBS R. 131), "they form a compact bundle or pattern, and the effect of their joint impact upon licensees necessitates the regulations even more urgently than the effect of each singly."[60]

A. *Regulation 3.101—Exclusive Affiliation.*—Regulation 3.101 (*supra*, p. 5) provides that no license shall be granted to a station which has a contract with a network organization under which the station may not broadcast programs of another network. The Commission found that a contractual provision of this nature "hinders the development of other national networks" (NBC R. 87; CBS R. 107),[61] deprives the public of the programs of other networks in the many areas where all stations are under exclusive contract to NBC or CBS (NBC R. 87; CBS R. 107),[62] and denies station

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[60] For examples of the interdependence of the practices and their joint impact, see the Commission's Report (NBC R. 111–113; CBS R. 131–133).

[61] The Commission found (NBC R. 91; CBS R. 111), and the record shows (Tr. 3464–5), that in fact CBS adopted the exclusive affiliation provisions to obstruct new networks; and similarly that NBC included such provisions in 1936 only after some of its affiliates had begun to broadcast Mutual programs (NBC R. 87; CBS R. 107; Tr. 1859).

[62] The Commission found (NBC R. 87; CBS R. 107) that there are 45 cities with a population of 50,000 or more served by NBC or CBS or both to which no other network can obtain access under the exclusive affiliation provision. The provision not only excludes others absolutely, but in other important areas remits other networks to inferior outlets (NBC R. 87; CBS R. 107).

licensees "freedom to choose programs which they believe best suited to their needs" (NBC R. 88; CBS R. 108).

These considerations are fully supported by the testimony of witnesses at the Commission's hearings.[63] For example, the chairman of a group of independent radio network affiliates and president of a station which served as an outlet of both NBC and Mutual expressed his belief (Tr. 7950–51) that his station gives "the public better service because we have the choice of two good sets of programs," and testified that the public reaction to the station's wider offerings was not adverse but rather "we have been highly complimented."

The broadcasting of the baseball World Series in 1939 sharply illustrates the practical effect of the contractual provisions relating to exclusive affiliation. The program, carried by Mutual, was offered by it to a number of NBC and CBS affiliates in communities where Mutual had no outlets. NBC and CBS invoked their exclusivity clauses and so prevented their affiliates from broadcasting a program of outstanding interest to a substantial portion of the public which was thus altogether deprived of the service (NBC R. 88; CBS R. 108).

These circumstances establish the reasonableness of the regulation. If the Commission has

[63] Weber, Tr. 5169–70, 5172–74, 8251–2, see also Tr. 5177, 8272; McCosker, Tr. 5459–60; Shepard, Tr. 6666–68, 6669–70; Rosenbaum, Tr. 7950 *et seq.*; Baldwin, Tr. 6521; Roosevelt, Tr. 6289–90, 8304–5.

power at all to promulgate regulations dealing with such a situation, as we have shown in Point I, that it has, Regulation 3.101 forbidding the exclusive affiliation provision is plainly a rational remedy to achieve the permissable objective. Indeed, the exclusive affiliation provision of the network contracts is hardly distinguishable from other forms of exclusive tying agreement which may properly be forbidden in order to promote the public interest. See 38 Stat. 731; 15 U. S. C., Sec. 14.

NBC (Br. 17, 96) and CBS (Br. 17, 19, 93–95), however, insist that the regulation is unreasonable on the grounds that they spend large sums to provide their affiliates with fine sustaining programs which enhance the advertising value of their affiliates by building audiences and that it would be unfair for other networks to capitalize on these values by utilizing NBC or CBS affiliates as outlets; that, lacking exclusivity, NBC and CBS will have no further incentive to produce fine sustaining programs; that exclusivity protects the industry against "wild cat" networks promoted by opportunists; and that exclusivity divides network business more evenly among large and small stations."

" These arguments were made by NBC and CBS witnesses in the course of the Commission's hearing (Hedges, Tr. 1852–54; Paley, Tr. 3462–64; Weiss, Tr. 5489–92; Sarnoff, Tr. 8520–22; cf. Ethridge, Tr. 6666–68; Shepard, Tr. 5669–72), and were expressly rejected by the Commission (NBC R. 87–93; CBS R. 107–114).

These arguments are insufficient to establish that the regulation is unreasonable. If it is true that exclusivity prevents the growth of "wild cat" or irresponsible networks, it is also true, and far more important, that exclusivity is equally an obstacle to the rise of responsible and capable competitors of NBC and CBS. Competition can be depended upon to eliminate the irresponsible and inefficient, and to encourage responsible and efficient competitors to render valuable public service. Similarly, competition can be relied upon to insure that NBC and CBS will not degrade their own competitive stature by failing to produce the best commercial and sustaining programs of which they are capable.

The suggestion that it would be inequitable for other networks to capitalize on the audiences built by NBC and CBS sustaining programs ignores the fact that the stations bear a large share of the burden of such programs.[85]

Nor can it be said that the Commission unreasonably concluded (NBC R. 92; CBS R. 112) that, far from suffering as a result of the regulation, smaller stations would benefit. The very consequences which appellants urge as establishing the caprice of the regulation are those which now exist

[85] Stations furnish the time for sustaining programs; and in addition, access to sustaining programs is part of the consideration for which stations agree to give NBC and CBS free time, and time at a reduced rate, which the networks then sell to advertisers (NBC R. 73, 76–78, 90; CBS R. 93, 96–98, 110).

partly as a result of exclusivity provisions. The great majority of the large stations are already either operated by NBC or CBS or affiliated with the NBC or CBS networks (NBC R. 67; CBS R. 87); in general the smaller stations are unaffiliated and must look elsewhere than to the appellant networks for their programs and commercial advertising. In these circumstances, appellants' argument that prohibition of exclusive affiliation contracts will still further strengthen large stations at the expense of small ones is premised upon the highly improbable assumption that, under the regulation, the large stations will abandon the CBS or NBC programs which they now carry, in favor of programs currently broadcast by smaller stations, of Mutual or of a new network."

Further, as the Commission found (NBC R. 93; CBS R. 113), the elimination of exclusivity

"CBS and NBC are, in any event, hardly in a position to urge the regulation's supposed disastrous effects upon smaller stations, since those two networks manage and operate stations which are among the most powerful in the country, while their affiliated stations are generally the largest and most desirable in their respective communities (NBC R. 67; CBS R. 87). Similarly, stations WHAM at Rochester and WOW at Omaha, which are joined as plaintiffs with NBC, are, in respect of power and frequency, each the most desirable in their respective markets and exemplify the "most powerful stations" to which appellants insist all the "lucrative programs would gravitate" (see CBS Br. 95; NBC Br. 96). It seems improbable that stations would oppose regulations which would cause business to "gravitate" to them. Nor could they claim irreparable injury.

seems likely to introduce a greater amount of flexibility by giving advertisers a wider range of choice in respect of rates and coverage; if smaller stations are available to a national advertiser, he may strike a more precise balance between costs and coverage. In addition, insofar as the regulation makes possible the entrance of new networks into the field, there would be a greater demand for all stations and a wider latitude for all stations in obtaining network programs. And in any event, the "first call" permitted under Regulation 3.102 (*infra*, p. 88) will preserve for the smaller stations at least as much network business as they now enjoy.

Finally, that elimination of the exclusive affiliation provision will not have the disastrous effects upon the business of network broadcasting which appellants urge would seem to be fully demonstrated by current practices of the networks themselves. Although exclusivity clauses have until recently been embodied in a few NBC affiliation contracts, NBC's complaint does not claim that such clauses are now in effect.[47] On the contrary, it affirmatively appears that NBC has entirely abandoned exclusivity on the express ground that exclusivity provisions are "not essential to the

[47] NBC's complaint merely alleges (par. 36, NBC R. 12) that Regulation 3.101 would prevent exclusive clauses in new contracts; there is no allegation that NBC now desires to reinstitute exclusivity, or that any station objects to its elimination or desires its inclusion in a new contract.

existence of the industry," and though "desirable," are not "indispensable" (NBC R. 362–363).

B. *Regulation 3.102—Territorial Exclusivity.*—Regulation 3.102 (*supra*, pp. 5–6), a corollary to Regulation 3.101, declares a policy against contracts between a station and a network organization which prevents or hinders another station serving substantially the same area from broadcasting those network programs which are rejected by the contracting station, or which prevents or hinders another station in a different area from broadcasting network programs.[88] But contracts by which a station is given first call in its primary service area upon the network's programs are expressly permitted.

Much the same considerations which establish the reasonableness of Regulation 3.101 warrant the promulgation of this regulation. The territorial exclusivity provisions embodied in the contracts do more than prevent duplication, an end which, in itself, is unobjectionable. As the Commission found (NBC R. 93–95; CBS R. 113–115), these provisions also protect the affiliate from the competition of another station in the same area and deprive the listening audience of programs

[88] This type of "extra-territorial" exclusion is embodied in contracts between Mutual and the Don Lee regional network. This provision bars every station on the Pacific Coast except Don Lee affiliates from receiving Mutual programs, even though the other stations are not within the service area of any Don Lee affiliate (NBC R. 114–115; CBS R. 134–135).

which might otherwise be available. An affiliated station may, and often does, reject a network sustaining program;* under the territorial exclusivity clause, if it does so, no other station serving the same area may carry the program since the network is forbidden to offer it to other stations.

The restrictive effects of these provisions and the consequent diminution of competition among stations, narrowing of network service, and limitation of programs available to the public are plain. As the Commission noted in its Report (NBC R. 95; CBS R. 115), "It is as much against the public interest for a network affiliate to enter into a contractual arrangement which prevents another station from carrying a network program as it would be for it to drown out that program by electrical interference." In these circumstances, a prohibition of such clauses is plainly reasonable. Full protection against duplication is afforded under the regulation, which strikes only at the evils attendant upon territorial exclusivity clauses. And the record establishes that no serious injury is done to the network broadcasting structure by the regulation. NBC has granted territorial exclusivity clauses only rarely, and then reluctantly and after a "knock-down drag-out

* In contrast to the limitations upon an affiliate's right to reject a network *commercial* program (see *infra*, pp. 105–106), an affiliate may normally refuse to carry a *sustaining* program for any reason whatever (NBC R. 76; CBS R. 96).

fight" (Hedges, Tr. 1964–67). Nor does CBS, which uniformly grants exclusivity, claim injury to its network; it urges only that the regulation is harmful to affiliates (CBS R. 237). But the only harm which may be done to CBS affiliates is the harm which derives from insisting upon abandonment of monopolistic practices, for the record shows that CBS rests its claim of advantages accruing to affiliates from territorial exclusivity upon the fact that "Columbia programs are not available to their competitors in their area, and they are certain of income from whatever national sales Columbia makes in their territory" (Paley, Tr. 3466).

C. *Regulation 3.103—Duration of Affiliation Contracts.*—The standard NBC and CBS contract with their affiliates binds the affiliates for five years, with the right of the network, but not the affiliate, to terminate the contract upon a year's notice (NBC R. 71; CBS R. 91; Tr. 1819, 1903, 8812, 3638, 3681; Tr. Exh. 282, cl. 14).[70] The Commission found that these long-term contract provisions tend to diminish competition among stations for network affiliation, and to impede the establishment of new networks; it also found that the contracts deprived the stations of a desirable flexibility which would permit them to make ap-

[70] As has been pointed out (*supra*, p. 28, note 32) NBC has apparently surrendered its right of cancellation upon a year's notice.

propriate adjustments to changes in local needs or in the character or quality of network service (NBC R. 95–98; CBS R. 115–118). Accordingly, Regulation 3.103 (*supra*, p. 6) limits the contract of affiliation to a period not longer than two years.

The record provides firm basis for the Commission's conclusions and for the reasonableness of its two-year limitation. While the opinions of witnesses were in conflict,[71] the testimony establishes that the five-year affiliation contract was developed in order to protect NBC and CBS from losing their affiliates to other networks,[72] and was, accord-

[71] Witnesses who opposed limitations upon the length of affiliation contracts included Hedges, Tr. 1819–20; Lohr, Tr. 2595–98; Akerberg, Tr. 3718–19; Sarnoff, Tr. 8542–46; Elliott Roosevelt, Tr. 8309. Two witnesses for the Mutual Broadcasting System favored a two-year limitation. McCosker, Tr. 5448–51; Weber, Tr. 8283–84. See also the testimony of Mr. Rosenbaum, Tr. 7936–37.

[72] NBC: Hedges, Tr. 1819–20: "Our present contracts run up to five years. The reason for that was simply this: With a contract of this nature, which I have just described, where a station may cancel upon a year's notice, we were exposing ourselves to our competition. Our competition, so we were informed, were perfectly willing to sit down and negotiate contracts with such of our affiliates as it desired, and bide their time for the year to elapse before they could take over the stations.

"It seemed rather poor business for us to leave ourselves in such a vulnerable position. * * *"

CBS: Akerberg, Tr. 3719: "It has been my personal experience that a length of time up to five years has been the practical period of time because should there be a year

ingly, designed to restrict competition. Indeed, it appears that NBC embodied its five-year provision only in 1936, in response to the threat of the recently formed Mutual system (NBC R. 95; CBS R. 115; Tr. 1819–1820, 3719).

Before the Commission, NBC grounded its contention that the regulation would be unreasonable upon its argument that it entered into leases for studio space and invested large sums in equipment in reliance upon the five-year contracts (Lohr, Tr. 2598; Sarnoff, Tr. 8545–46). But, as the Commission found, analysis shows that this contention is an afterthought. From 1927 to 1938 NBC built 17 studio plants at a total cost of $7,719,200. Eleven of these seventeen studio plants, built at a cost of $5,519,700, or 71 percent of the total, were completed prior to 1936, while the term of the NBC affiliation contract was still only one year[73] (NBC R. 96; CBS R. 116; Tr. Exh. 64).

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to year situation you would be continually renewing and renegotiating and renewing contracts, and you would also be vulnerable from a competitive standpoint."

[73] Shortening of the affiliation contract period presents no problem with respect to a contract between the network and the station for a particular series of programs which runs beyond the termination date of the affiliation contract. Such a series can be carried by the station even after it has shifted to another network, and in fact this not infrequently happens when a station changes its network affiliation. See the testimony of Shepard, Tr. 5658; Antrim, Tr. 4949.

What precise limitation constitutes a reasonable maximum for the duration of affiliation contracts is, of course, a matter of judgment. The Commission's conclusion that a two-year limitation is appropriate cannot be said to be unreasonable, particularly in the light of the fact that the permissible period is twice as long as that which was utilized by NBC for over a decade.

D. *Regulation 3.104—Option Time.*—CBS affiliation contracts and NBC contracts with stations west of Denver give the network an option on the station's time throughout the broadcast day. The NBC contracts with stations east of Denver place under option the hours from 10:00 to 12:00 noon, 3:00 to 6:00 p. m., 7:00 to 7:30 p. m., and 8:00 to 11:00 p. m.[74] All NBC and CBS option clauses require the station to broadcast network commercial programs on 28 days' notice during the hours covered by the option; all other program commitments of the station, whether to other networks or for non-network programs, are subject to cancellation or removal upon exercise of the option. (NBC R. 73; CBS R. 93; Tr. 3457; Tr. Exh. 282 cl. 2, 124 cl. III.)

Current option-time practices hamper the efforts of stations to build satisfactory schedules of non-network programs.[75] For example, NBC's

[74] On Sundays the hours are 1:00 to 4:00 p. m., 5:00 to 6:00 p. m., and 7:00 to 11:00 p. m.

[75] Hedges, Tr. 1802–1805; Paley, Tr. 3467; MacFarlane, Tr. 5318–21; Weiss, Tr. 5532–33; Sheppard, Tr. 5657–58.

Vice President in charge of station relations testified (Tr. 1802–03):

> During [network option] time then, if an advertiser, say, a national spot account or a local account, is sold network optional time the understanding that the station has with such a client is that he can play checkers with him and move him from one spot to another, keeping him within that network optional-time bracket but nevertheless keeping him out of the way of network programs.
>
> * * * * *
>
> From both the standpoint of the station and the advertiser, such a sale is somewhat less satisfactory than a firm placement during station time, for example. During station time the station is able to offer to the advertiser a fixed period and sell it on a guaranteed basis; he can sign up for 52 weeks if he desires and remain in that particular spot.

Similarly, the president of CBS testified that to some extent network option time "places a restriction on the station's untrammelled freedom of program selection" (Tr. 3467). The president of an association of transcription producers testified that the use of transcriptions has been seriously retarded by the fact that transcription pro-

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7858–60; King, Tr. 6398–400, 6478–80; Baldwin, Tr. 6504–07; Rosenbaum, Tr. 7953–54, 7957–58; Elliott Roosevelt, Tr. 8301–04, 8322–24.

grams are subject to removal by the exercise of network options (Tr. 6398–400, 6478–80). The Chairman of Independent Radio Network Affiliates and President of Station WFIL testified (Tr. 7953–54):

> A * * * I do know that quite frequently we have an opportunity to sell programs which we cannot accept because we cannot guarantee time owing to the fact that the time requested comes within NBC option time. We have, on several occasions, taken up with NBC, informally, a request to be permitted to guarantee time to an advertiser who wants to buy time which is included within the network option hours, but so far we have not succeeded.
>
> Q. (Mr. Funkhouser.) Were the programs that you lost such as to serve the public interest?
>
> A. I think so; they were commercial programs of good quality.
>
> Q. About the same pattern as your general program structure?
>
> A. At least as good.
>
> Q. Have you lost revenue on account of these restrictions?
>
> A. Naturally, being unable to accept commercial contracts for the reason that I have stated, we have not received the revenue from them.

Regulation 3.104 (*supra*, pp 6–7) affects these practices in three respects:

1. The minimum notice period for exercise of the option is extended to 56 days.

2. Not more than three specified hours in each of four segments of the day may be placed under network option. These four segments are 8:00 a. m. to 1:00 p. m., 1:00 p. m. to 6:00 p. m., 6:00 p. m. to 11:00 p. m., and 11:00 p. m. to 8:00 a. m. Thus in each of the three commercially important segments two specified hours must be immune from network option, and therefore will be available for firm commitments for non-network programs. The station may, however, *sell* (but not option) time to the network within the hours so withheld for a program or series of programs.

3. The option may not be used to displace a program commitment to another network, and the affiliation contract may not prohibit the station from optioning time to another network if it so desires.

Both the extension of the notice period and the limitation on the hours which may be optioned have the same purpose—to strike a balance between the convenience of the network in scheduling programs for simultaneous broadcasting over numerous affiliates and the freedom of the stations to schedule non-network programs on a stable basis.

The appellant networks contend (CBS R. 240-241; NBC R. 242) that the extension of the notice period to 56 days will hamper a network in clear-

ing time for its programs. That the 56-day requirement will disrupt network business is doubtful in view of the fact that the networks often give notice of the exercise of the option 60 days or more before the commencement of the program."[76]

Neither CBS nor NBC attack the requirement that certain specified hours be withheld from network option time."[77]

The third change in current network option time practices arises from the requirement that network options may not be utilized to displace the programs of other networks. The restraining effects of current option time practices on the development of new networks and on the distribution of network programs are aggravated by the fact that the time under option to CBS and NBC is, on the average, more than double the time actually used for commercial programs."[78] During the many hours which NBC and CBS hold under option but do not use commercially, other net-

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[76] Akerberg, Tr. 3660–62, 3701; Morton, Tr. 6897–6898.

[77] The effect of this requirement upon NBC will be almost negligible, since NBC now options only 2 hours in the morning, 3 hours in the afternoon, and 3½ hours (which under the regulation would be reduced to 3 hours) in the evening segment of the broadcast day.

[78] In 1938, CBS so used only 39% of the optioned hours of its basic network stations, while NBC used 58.1% on the basic Red and only 19.4% on the basic Blue network (NBC R. 99–100; CBS R. 119–120; Tr. Exh. 665, 670). The disparity between the hours covered by option and those actually used is far greater on non-basic or "supplementary" stations.

works can schedule programs on NBC and CBS affiliates only subject to removal or cancellation on 28 days' notice. This places them at a serious disadvantage because it is generally recognized that 13 weeks is the minimum period for which a network commercial program series can be scheduled.[39] (See testimony of Mr. Weber, Tr. 5192–95; Mr. Shepard, Tr. 7888–92.)

The appellant networks insist (NBC Br. 11–13, 96; CBS Br. 11–12, 16, 94) that Regulation 3.104 is impractical and unreasonable and is fatal to commercial network broadcasting. But analysis of the precise impact of the regulation, and of the extent to which it requires changes in existing methods, readily demonstrates that it will have no such disastrous consequences as appellants or *amicus curiae* Association of National Advertisers, Inc., predict.[40] Initially, it is to be emphasized

[39] NBC's Vice President in charge of sales testified: "We feel in radio a new advertiser is likely not to feel the benefits of his radio advertising until he has been on the air a considerable length of time. It depends upon the circumstances. It may be necessary for him to be on 26 weeks before he begins to get a real lift from his radio advertising. He may be on only a matter of a few weeks; one program may give him a tremendous reaction. It all depends upon the circumstances, but by and large we feel that 13 weeks of radio advertising is about the minimum for which an advertiser can expect to get results." Witmer, Tr. 2165.

[40] The Association of National Advertisers (Br. 25–26) suggests that under the Commission's option rule large advertising agencies would be able to form their own network by contracting with the most powerful stations and

that the regulation deals with *options* only; it is concerned only with the broad right, now enjoyed by the networks, to drive all programs off the station, even though contracts have been completed for such programs, as long as the right is exercised at least 28 days before the time scheduled for such programs. The regulation does not in any way limit the right of the station to *sell* time to a network for a program or series of programs. Thus, if a network and a sponsor have come to an agreement for the production and broadcasting of a program, the network can purchase from the stations time for the program for a week, or for a year, or for whatever period the advertiser desires. Once the time is purchased, the matter, insofar as the regulation is concerned, is settled; no other program can displace it. Thus stability remains and there is complete assurance for the network and the sponsor.

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that this would subtitute a monopolistic network of the large stations for the now highly competitive existing networks. It is stated that plans are under way to enter into such contracts if Regulation 3.104 is sustained. The short answer to this contention, which, it will be noted is made by an association of advertisers whose members would undoubtedly benefit by the regulation thus attacked, is that if it should be shown to the Commission that the public interest is adversely affected by such an "advertiser" network, the Commission could prevent the evil either by permitting the option granted by Section 3.104 to clear away the programs of the "advertiser" network or by other appropriate regulation.

The impact of the regulation is confined to the period *before* actual sale. Even so, its reach is comparatively limited. At any time up to 56 days before the contemplated program is to be broadcast, the network can exercise its option, within the permissible hours (*supra*, p. 96), and remove any programs which have been contracted for on the desired station except programs of other networks. Prior to the 56 days, therefore, the network can clear time as against all local, national spot, transcription, or other non-network programs which the stations have contracted to carry. The exception making it impossible to exercise the option so as to clear contracted-for programs of other networks simply affords equal competitive opportunity to all networks and precludes use of the option device to hinder other networks.

There is no sound basis for the suggestion that it is impractical and burdensome for CBS and NBC to communicate with their affiliates in order to ascertain whether a particular period is available. It is true that the networks, before closing an agreement with a sponsor, must first ascertain whether the desired affiliates have already contracted with other networks. But there are no great mechanical difficulties in the way of such ascertainment. Ready means are available for communication between network and affiliate. These communications are now carried on by the

networks as a routine matter under existing option clauses. In respect of NBC, the testimony of its Traffic Manager is conclusive in this regard: An interchange of telegrams is all that is necessary."[81] Similarly, CBS is excellently equipped to obtain practically instantaneous information from its affiliates; it maintains teletype machines at every station affiliated with it. CBS sends out telegraphic orders to its affiliates concerning the scheduling of commercial programs, and requires the stations "to advise as to their acceptance by return mail" (Cowham, Tr. 3300–3316). In the light of this testimony by NBC's and CBS's own witnesses, the suggestion of difficulty in checking with the station as to clearance for programs is plainly of insufficient substance to permit condemnation of the regulation as unreasonable.

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[81] Tr. 924–25: "Q. (Mr. Hennessey.) Now, Mr. McClancy, coming to your ordinary operating procedure, will you first describe the operating procedure which the traffic department follows in scheduling network commercial programs, and first with respect to a commercial program in network optional time where you are able to give the station 28 days' advance notice that the program has been scheduled?

"A. When the traffic department receives from the sales department an order for several groups of stations or several individual stations, the commercial traffic division passes that information along to the stations by telegraph, informing them of the name of the client, its product, when the program is scheduled to start, its time, also the talent. Based upon these facts, the station sends us a telegram either accepting or refusing the program."

Nor is there warrant for CBS's suggestion (Br. 16–17) that it will be faced with difficulty in its dealings with advertisers. In conformity with Regulations 3.104, CBS may option 3 hours during each of the morning, afternoon, and evening segments of the broadcast day over all of its affiliated stations. The option will be effective against all programs except those of another network. CBS can and undoubtedly will require its affiliates to keep it currently advised of commitments with other networks against which the CBS option may not be effective. Such information can be posted in convenient form so that, at a glance, CBS may determine what periods are available for commercial programs over each of its affiliates. An advertiser who comes to CBS with a request for 90 stations can be advised precisely and promptly what periods of time are available for clearance under the CBS option over the stations he wants. Should the advertiser then make his decision with respect to periods and stations, all that is required to bind the bargain with all the stations is a telegram (or teletype message) from CBS to its affiliates calling upon them to carry the program of the advertiser pursuant to their option-time arrangement with CBS. Once the affiliates have accepted and agreed to carry the program, the commitment is good against the world.

NBC (NBC R. 241) likens the possibility of confusion under the regulation to that of vehicular traffic operating without traffic lights. This simile would lead one to suppose that radio advertisers are as numerous as automobiles and networks as numerous as streets. It must be borne in mind that the option-time clause proposed by Regulation 3.104, like the option-time clauses currently in use, can be exercised to displace all non-network programs, and thus gives network programs right-of-way over all programs which might prevent the simultaneous broadcasting of network programs on numerous stations. Network advertisers are relatively few in number. An NBC witness estimated that there are only about 300 potential national network advertisers (Witmer, Tr. 2288); a CBS witness doubled this estimate (Kesten, Tr. 4114). Another NBC witness stated that perhaps 25 customers supply the majority of NBC's income (Lohr, Tr. 2595–98). In 1937 a total of only about 200 advertisers used the CBS and NBC (both Red and Blue) networks (Kesten, Tr. 4113; see also Witmer, Tr. 2229). There are only three national network organizations,[82] and the

[82] Regulation 3.104 requires that option-time clauses be nonexclusive as against regional as well as national networks. There are only seven regional networks of importance and three of these serve as "group outlets" for national networks (NBC R. 65, 139–146; CBS R. 85, 159–166).

program schedules of each are well known to its two competitors. Many programs are regarded as fixtures on a particular network; over a period of "some several years" CBS successfully solicited only some 42 new advertisers, and lost to other networks only 32 clients (Kesten, Tr. 4046). Negotiations with advertisers for new network programs are, in the nature of things, bruited about in the industry, and, because of the limited number of national network advertisers and the limitations which time itself places upon the volume of network advertising, not many negotiations for new contracts are ordinarily in course at any given time. Consequently, clearance as against non-network programs is in any event the chief value of network options insofar as they constitute a "business convenience" for clearing time.

Thus, it is clear that the Commission has retained the advantages of option time as a business convenience, to the maximum degree compatible with the public interest in competition and station responsibility. By forbidding option time as against other networks, the regulation ameliorates the evil of utilizing options to the detriment of rival networks and removes a serious obstacle in the way of development of new networks. By assuring local programs of a guarantee of at least 56 days' duration even during the hours which may permissibly be optioned, and of unlimited duration during those hours

which are not subject to option, the regulation substantially frees the stations to broadcast local programs and to cater more adequately to the local needs of the community. In these circumstances, we submit that the regulation is a plainly reasonable solution of the networks' business demands on the one hand, and the demands of free competition, station responsibility, service of local interests, and maximum use of facilities on the other.

E. *Regulation 3.105.—Station Rejection of Network Programs.*—The present form of contract entered into by CBS or NBC and their affiliates normally requires the affiliate to take and broadcast network commercial programs unless such programs are not in the public interest (NBC R. 74–75; CBS R. 94–95; Tr. 1795; Tr. Exh. 124 cl. III, 282 cl. 2).[22] As the Commission found (NBC

[22] The NBC contract provides that the station may reject a network program the broadcasting of which would not be "in the public interest, convenience, or necessity." This has been interpreted by NBC to permit the station to substitute a local sustaining program of outstanding public interest (NBC R. 74; CBS R. 94). But if the station rejects a program, NBC requires the station to "be able to support his contention that what he had done has been more in the public interest than had he carried on the network program" (Tr. 1795). In no circumstances may the NBC affiliate substitute a local commercial program; if it does so, it is subject, *inter alia*, to payment of liquidated damages to NBC (NBC R. 74; CBS R. 94).

The CBS clause relating to rejection of programs provides (NBC R. 74; CBS R. 94):

"Either the station or Columbia may on special occasions substitute for one or more of such sponsored programs sus-

R. 101–102; CBS R. 121–122), these provisions place practical difficulties in the way of a station which seeks to furnish the public with the best available programs. Precise information concerning the proposed network program usually is not, and cannot be, furnished to the station in advance (NBC R. 75; CBS R. 95; Tr. 1986–88, 1891). In no event may the station reject the network program for a local commercial program, regardless of the local interest in such program. And as a practical matter, the burdens upon the station of establishing the superiority of the local program, or of establishing that its rejection of the proposed network program is reasonable, are so great that the right of rejection is substantially empty of content.

In these circumstances, the Commission promulgated Regulation 3.105 (*supra*, pp. 7–8), which provides that affiliation contracts may not prevent or hinder the station from rejecting network programs (1) which the station "reasonably believes to be unsatisfactory or unsuitable," or which (2) in respect of network programs already contracted

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taining programs devoted to education, public service, or events of public interest without any obligation to make any payment on account thereof * * *. In case the station has reasonable objection to any sponsored program or the product advertised thereon as not being in the public interest, the station may, on 3 weeks' prior notice thereof to Columbia, refuse to broadcast such program, unless during such notice period such reasonable objection of the station shall be satisfied. * * *"

for, in the opinion of the station "is contrary to the public interest," or from substituting a program of "outstanding local or national importance."[*] The regulation does no more than reiterate the requirement of the Communications Act (Sections 301, 309, 310) that station licensees be personally responsible for the operation of their stations in the public interest. The Commission, accordingly, reasonably concluded (NBC R. 101–102; CBS R. 121–122) that such responsibility is not borne by a station which abdicates by agreeing to accept programs on any other basis than his own reasonable decision that the programs are satisfactory. Nor do we understand that appellant networks attack the regulation as arbitrary or capricious (see CBS Br. 12): Plainly the regulation which simply insists that the station fulfill its statutory obligation is reasonable.

F. *Regulation 3.106—Network Operation of Stations.*—Regulation 3.106 (*supra*, p. 8) provides that no license shall be granted to a network organization for more than one station per service area, or for any station in any locality where the existing stations are so few or of such unequal desirability that competition would be substan-

[*] In respect of programs already contracted for, the regulation conforms to the existing contractual provisions relating to rejection. See *supra*, note 83.

tially restrained by such licensing.[85] The Commission, in its Report, expressly, provided for the future operation of this regulation by further administrative proceedings. While it concluded that "the licensing of two stations in the same area to a single network organization is basically unsound and contrary to the public interest," the Commission stated that in any particular case, networks will be given full opportunity, upon application for new facilities or renewal of licenses, to advance reasons why the principles which the Commission found to be controlling should be modified or held inapplicable (NBC R. 105; CBS R. 125). Similarly, the Commission stated that as to the second situation covered by the regulation—ownership of a station in a locality where other station facilities are limited—networks have full opportunity and right to show at the license hearing that the public interest nevertheless requires network ownership of a particular station (NBC R. 105; CBS R. 125).

While the future operation of this regulation is thus incapable of precise ascertainment, since its application must necessarily await scrutiny of the particular circumstances in a licensing pro-

[85] Although the Commission noted that "as an original matter," it "might well reach the conclusion that the businesses of station operation and network operation should be entirely separated," the Commission concluded that it was "inadvisable to compel these networks to divest themselves of all their stations" (NBC R. 103; CBS R. 123).

ceeding, it is nevertheless plain that the provision is wholly reasonable. The facts of network ownership of stations establish the dangers of such practice. Thus, at the time of the Commission's Report, NBC was the owner and licensee of ten stations, CBS of eight. These 18 stations are among the most powerful in the country (*supra*, p. 22).[56]

Network ownership of stations, as the Commission found (NBC R. 103; CBS R. 123), permanently renders such stations inaccessible to competing networks; thus some of the most important stations in the critical areas are entirely withheld from network competition and reserved exclusively to their network owners. The discouraging effect of this situation upon the creation and growth of new networks is plain.[57] Especially is this effect apparent in the two particulars with which the regulation deals: the network ownership of two stations in a single area, and such ownership of a station in a locality where the available facilities are few and of unequal coverage. Thus, for example, at the time of the Report, in Washington, D. C., NBC owned two of the three regional stations, and CBS the only clear-channel station. In

[56] Of the 25 1-A clear-channel stations in the country, NBC and CBS are the licensees of ten (NBC R. 103; CBS R. 123).

[57] The Commission also noted the dual position created by network ownership of stations; the networks' interest as the owner of stations may conflict with its interest as a network organization serving affiliated stations (NBC R. 103; CBS R. 123).

Charlotte, N. C., there are but two stations, one of which is a 50,000 watt station owned by CBS."

In situations such as these, competition of new networks is virtually foreclosed. If the Commission has authority, as we submit it has, to consider the public interest in avoiding dominance and in encouraging competition, this regulation is clearly a permissible and rational remedy to achieve those objectives.

G. *Regulation 3.107—Operation of More Than One Network by a Single Network Organization.*—Regulation 3.107 (*supra* pp. 8–9), provides that no license shall be issued to a station which is affiliated with a network organization which maintains more than one network. It relates primarily to the operation by NBC of two networks. The considerations underlying the Commission's adoption of this regulation are set forth in its report (NBC R. 106–109; CBS R. 126–129). The regulation has been indefinitely suspended (NBC R. 211–212; CBS R. 29–31) and its validity is, accordingly, now moot.

H. *Regulation 3.108—Network Control of Station Rates for Non-network Programs.*—Regulation 3.108 (*supra* p. 9) is directed against the inclusion in affiliation contracts of a clause which only NBC among the national networks has ever incorporated in its contracts. This clause empowers NBC to reduce a station's network rate and

" In April 1941, the Commission granted a permit to construct a third station in Charlotte. No license has yet been issued.

compensation from network commercial program if the station sets a lower rate for non-network national advertising than the network card rate for the station (NBC R. 109; CBS R. 129; Tr. Exh. 133). The purpose of the clause is frankly to protect the network against competition of its affiliates (NBC R. 109–110; CBS R. 129–130).

The clause has since been eliminated from NBC contracts.[89] While NBC's complaint seeks an injunction against this regulation, it does not allege either that such clauses are embodied in any of its affiliation contracts or that it desires to embody such a clause in future contracts (NBC R. 11–12). In any event, the Commission was clearly warranted in striking down this method of coercive price-fixing; the reasonableness of the regulations readily appears from the Commission's report (NBC R. 109–111; CBS R. 129–131) summarized above (pp. 35–36) in the Statement.

Conclusion.—The foregoing analysis of the several regulations, we submit, establishes their reasonableness both singly and in combination. And, indeed, we do not understand that appellant networks attack each particular regulation as unreasonable. Rather, they content themselves with the broad contention (CBS Br. 89–96; NBC Br. 88–90, 96–97) that network broadcasting would be

[89] See the testimony of Niles Trammell, NBC President, in Hearings before S. Committee on Interstate Commerce, on S. Res. 113, 77th Cong., p. 462.

seriously injured. In the course of its argument on this branch of the case (Br. 88–98), NBC refers only to option time (Regulation 3.104);[90] similarly, CBS in its argument (Br. 89–96) confines itself to Regulations 3.101, 3.102, and 3.104. Yet as we have noted (*supra*, pp. 81–82), the various practices with which the regulations deal do not operate in isolation and, accordingly, neither do the regulations.

Nor, we submit, is there warrant in any event for the contention that the regulations will tear down the entire structure of network broadcasting. True, the regulations will require abandonment of some rather "convenient" business practices. But such abandonment will entail no such revolutionary destruction as appellants depict. As we have seen, NBC itself has abandoned its exclusivity clause dealt with in Regulation 3.101 (*supra*, pp. 87–88); as to Regulation 3.102, it has only rarely granted territorial exclusivity, and thus only reluctantly (*supra*, pp. 89–90); for over a decade it operated with affiliation contracts extending only a year (*supra*, p. 92)—half as much as Regulation 3.103 permits; it appears to make no contention that Regulation 3.105 injures its business; it concedes (Br. 6) that its complaint is not "primarily directed" to Regulations 3.106

[90] Thus in its "Statement" (Br. 20), NBC observes only that Regulation 3.104 "strikes at the heart of network broadcasting; the remaining regulations blanket the entire field."

and 3.107; and it has itself eliminated the rate clauses dealt with in Regulation 3.108 and makes no contention that it desires to reinstate them in their affiliation contracts (*supra*, p. 111).

As to CBS, Regulations 3.107 and 3.108 are admitted to be inapplicable to it (CBS Br. 9). In respect of Regulation 3.105, CBS notes that its affiliation contracts already "substantially correspond" to the regulation (Br. 12). The precise effect upon CBS of Regulation 3.106, as has been noted (*supra*, pp. 107–108) remains for its future application. And if NBC concludes, as we have seen it has, that its network operations can continue without the clauses dealt with by Regulations 3.101, 3.102 and 3.103, no reason is apparent why CBS would be destroyed by their abandonment.

This leaves only Regulation 3.104 with the supposed fatal effects. But, as we have seen (*supra*, p. 97), the enlargement of option time from 28 to 56 days conforms to the frequent practice of taking up options within the latter period, while neither of the appellant networks attack the limitation upon hours which may be subject to option. Indeed, the only effect of the latter requirement upon NBC will be to reduce the evening segment of the broadcasting day subject to option from 3½ to 3 hours (*supra*, note 77). And, finally, as we have described above (*supra*, pp. 98–104), the Commission's refusal to permit options exclusive against other networks in no way prevents

firm commitments by actual *purchase and sale;* and ready mechanical means are available to check for clearance and to ascertain promptly whether a firm commitment, good against everyone, can be made.

It is also to be noted that the testimony of the networks' own witnesses establishes that many of the contractual clauses dealt with by the regulations were adopted not to serve some public interest but solely for "competitive" reasons, i. e., to avoid or to meet competition. Thus, as we have seen, NBC's president in charge of station relations testified that the exclusive affiliation clause was adopted to prevent NBC outlets from affiliating with "any network which would seek to establish itself as a national advertising medium" and thus compete with NBC (Tr. 1852–1854); the president of CBS testified that the territorial exclusivity provisions were to exclude competitors and assure the CBS affiliates of income (Tr. 3466); NBC utilized the five-year affiliation clause because without it "we were exposing ourselves to competition" (Tr. 1819–1820), while a CBS witness similarly testified that absent the clause "you would also be vulnerable from a competitive standpoint" (Tr. 3718–3719); and NBC conceded that its rate provisions were to protect it against the competition of its own affiliate (Tr. 1825–1826).

In sum, we submit that the Commission's action, far from being arbitrary and capricious, rep-

resents a moderate accommodation of existing business practices to the public interest. What loss is suffered by appellant networks in their comfortable business habits is far out-balanced by the furtherance of the public interest in station responsibility, in maximum use of facilities, in competition, in greater flexibility and choice, and in larger emphasis upon local autonomy and local programs and affairs. The regulations are well calculated to achieve these *desiderata* without improperly or injudiciously disturbing the existing network broadcasting structure.

III

THE COMMUNICATIONS ACT, INTERPRETED AS AUTHORIZING THESE REGULATIONS, IS CONSTITUTIONAL

A. *There is no unlawful delegation of legislative power.*

CBS urges (Br. 79–83) that, if the Act is construed as conferring upon the Commission power to issue these regulations, it is unconstitutional and void in that its standards are too broad and therefore it delegates legislative power to the Commission in violation of the Constitution. This Court has repeatedly stated, however, that the Communications Act and its predecessor, the Radio Act of 1927, declare a policy and establish standards which meet constitutional requirements. *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266, 285; *Panama*

Refining Co. v. *Ryan*, 293 U. S. 388, 428; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137–138. These cases, as well as decisions sustaining other statutes containing similar language,[21] hold that the criterion of "public convenience, interest, or necessity" is not a "mere general reference to public welfare,"[22] but a phrase which gains content from its context and the purposes of the statute. In particular, the Court pointed out in the *Nelson Brothers* case, 289 U. S. 266, 285, that "The requirement is to be interpreted by its context, by the nature of radio transmission and reception, [and] by the scope, character and quality of services * * *". "While this criterion is as concrete as the complicated factors for judgment in such a field of delegated authority permit, it serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy."[23] The standard of "public interest" in Section 5 (4) (b) of the Interstate Commerce Act is broad enough to permit the Interstate Commerce Commission's conditioning its approval of a proposed lease of carrier properties upon the carrier's compensating its

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[21] *New York Central Securities Co.* v. *United States*, 287 U. S. 12, 24–25, and cases cited.

[22] *Ibid.*

[23] *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138.

employees who suffer because of the lease;" similarly the standard of "public convenience and necessity" in Section 1 (18) of the Interstate Commerce Act permits the Commission to impose like conditions upon approval of consolidation for the protection of employees." It seems clear that if these standards are sufficiently broad to permit of such action without running afoul of constitutional limitations upon delegation of power, the instant standards, as construed, are not void.

It is thus plain that the standards contained in the Communications Act are sufficient. Whether the chain broadcasting regulations come within the standards is the question of statutory construction considered in Point I, *supra, pp.* 43–79. For the reasons there set forth, we believe that various provisions of the Act and its legislative history indicate that it was designed to permit regulations the object of which was to improve the character and quality of service to the listening public through the preservation of competition, and through assuring station responsibility and maximum use of facilities.

B. The regulations do not constitute censorship or an abridgement of freedom of speech

Appellants contend (NBC Br. 28–43; CBS Br. 83–88) that the regulations violate the First

[94] *United States* v. *Lowden*, 308 U. S. 225.

[95] *Interstate Commerce Commission* v. *Railway Labor Executives Assn.*, 315 U. S. 373.

Amendment [96] and the provision in Section 326 of the Communications Act that—

> Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication. * * *

It is apparent from the face of the regulations that they do not regulate or restrict freedom of speech. They are concerned solely with the contractual relations between networks and affiliates, with the ownership of stations by networks, and with common control of more than one network. They are not concerned with program content and in no way attempt to regulate what may or may not be said on the air.

The regulations do not prevent the licensees of radio stations from broadcasting any program they see fit; on the contrary, their primary purpose is to increase the freedom of the licensee to broadcast what he prefers without any restriction whatsoever. The regulations do interfere, to

[96] As originally filed, neither of the complaints contended that the regulations violate the First Amendment. CBS introduced that issue in an amendment to its complaint (CBS R. 48). The NBC complaint is still silent on this point.

some extent, with the station's freedom of contract, insofar as they prohibit contracts containing certain restrictive provisions, but the object of the prohibition is to maintain a competitive system under which freedom of speech will not be impaired.

That liberty of contract does not protect agreements which restrain competition is evidenced by numerous decisions under the Sherman, Clayton, and Federal Trade Commission Acts. Industries which are engaged in the dissemination of ideas and information are not exempt from these laws. Even "the publisher of a newspaper * * *, is subject to the anti-trust laws." *Associated Press v. National Labor Relations Board*, 301 U. S. 103, 132–133; *Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Co.*, 293 U. S. 268. If restrictive covenants in these industries may be forbidden under such statutes without violating the First Amendment, they may likewise be reached under the Communications Act.

Appellants attempt to avoid these principles by arguing that the First Amendment does not permit their effectuation by means of licensing. On this theory the entire Communications Act would be invalid. And yet it is clearly established that regulation of the radio industry through a licensing system is lawful. The nature of the radio spectrum requires that there be a limitation upon the number of broadcasting stations, and this differentiates the radio from other media for the expression of ideas.

It is contended that since the need for licensing arises from physical limitations, licenses can only be conditioned on factors relating to the physical problems of confusion and interference between stations. But the *Sanders* case,[7] upon which appellants rely, itself recognizes that "an important element of public interest and convenience affecting the issue of a license" is the service to the community rendered by an applicant, and points out that this requires consideration of an applicant's financial qualifications and the effect of competition (309 U. S. at 475–476). And the *Nelson Brothers* case[8] shows that the Commission legitimately considers the type of service rendered by stations, in additions to such matters as the elimination of interference (289 U. S. 270–273, 285).[9] These cases demonstrate that the Commis-

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[7] *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470.

[8] *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266, 285.

[9] In fact, NBC and CBS themselves recognize that the Commission can consider questions of program service etc. by urging upon the Commission as reasons for granting or denying particular applications the quality of the service rendered by their stations (See e. g. Petition for Rehearing (pp. 6, 8–10) filed by National Broadcasting Co., against grant of Application of WJW, Inc. (File No. B2–P–3263); Notice of Appeal and Petition for Rehearing filed by National Broadcasting Co., against grant of application of Matheson Radio Company, Inc., (Transcript of Record on petition for certiorari, No. 585, this Term, pp. 10, 62); Application of Columbia Broadcasting System, Inc. (Docket No. 6024). Proposed Findings of applicant, p. 9).

sion may take into account other than physical factors in allocating or denying broadcasting licenses."[100]

It is thus clear that a regulation not concerned solely with physical matters does not, for that reason, violate the First Amendment. The guarantee of free speech, as embodied in the Constitution and Section 326, is impinged only by regulations which tend to interfere with a station's right to broadcast what it wants. The regulations in question here, although they may restrict a station's right to contract as it chooses, safeguard, rather than restrict, its freedom to broadcast what it chooses.

IV

THE DISTRICT COURT PROPERLY DECIDED THESE CASES UPON THE ADMINISTRATIVE RECORD WITHOUT FURTHER TRIAL

The district court granted the Government's motions for summary judgment, thus disposing of the cases on the basis of the administrative record

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[100] See *Heitmeyer* v. *Federal Communications Commission*, 95 F. (2d) 91 (App. D. C.), and cases cited; *Boston Broadcasting Co.* v. *Federal Radio Commission*, 67 F. (2d) 505 (App. D. C.). For cases in which renewal of a license was denied because programs previously broadcast were deemed contrary to the public interest, see *Trinity Methodist Church* v. *Federal Radio Commission*, 62 F. (2d) 850 (App. D. C.), certiorari denied, 288 U. S. 599; *KFKB Broadcasting Ass'n* v. *Federal Radio Commission*, 47 F. (2d) 670 (App. D. C.).

which was attached as an exhibit to the motions. Appellants urge (NBC Br. 91–98; CBS Br. 97–103) that the court should have required the Government to file an answer, and that the issues should then have gone to trial before the court; they do not, however, point to the particular evidence and facts, not already before the court, which should be permitted to be tried. The question presented, accordingly, is whether appellants are entitled to a trial *de novo*, or whether these cases are to be determined upon the basis of the administrative record.

Appellants concede, as they must, the normal rule to be that where hearing has been held before an administrative agency, the reviewing court must limit its inquiry to the record so made before the agency. *Tagg Brothers & Moorhead v. United States*, 280 U. S. 420, 433–445; *Acker v. United States*, 298 U. S. 426. Appellants nevertheless insist that the hearing held by the Commission was not of such a kind as to permit the application of the rule. Although this Court's holding with respect to the reviewability of the order here involved suggests the contrary,[10] appellants contend that the

[10] In this connection the court below said (NBC R. 527; CBS R. 489): "It would be futile after the expenditure of so much time and labor to hold that the proceedings were only advisory and concluded nobody; indeed, the mere fact that the regulations are 'orders' reviewable under § 402 (a) would seem to preclude such a conclusion. We do not understand the Supreme Court to mean that every minatory gesture of the Commission is reviewable under that section."

case must be opened and that the court must hear all the evidence relating to the regulations which the Commission has already heard. The appellants undertake a heavy burden to establish that such extensive duplication is required. We submit that they have not met the burden.

Since appellants predicate much of their argument on this branch of the case upon the type of hearing and the procedure afforded them, it is important to set out what happened. The pertinent facts are these:

On March 18, 1938, in Order No. 37, the Commission directed that an investigation be undertaken to determine what special regulations applicable to radio stations engaged in chain or other broadcasting were required in the public interest, convenience or necessity; the Order provided that inquiry be made into a number of specified subjects (NBC R. 27; CBS R. 36–37). These must be read in their entirety to appreciate how close they come to the subjects covered by the regulations finally issued. It is sufficient to note here that they included the contractual rights and obligations of stations engaged in chain broadcasting, contractual provisions for exclusive affiliation with a single network, network ownership of stations, the hours and time over the station affiliates which the networks control, the rights of stations to reject network programs, and practices and agreements in restraint of trade or furtherance of monopoly (NBC

R. 27; CBS R. 36–43). Copies of this Order were published (3 Fed. Reg. 37) and were mailed to every broadcasting station and network organization (NBC R. 28; CBS R. 38). On September 20 the Commission sent to the same parties a notice of hearing containing an itemized list of matters as to which the networks were to present evidence (NBC R. 447–449; CBS R. 38–42). The hearing was held before a committee composed of three commissioners (NBC R. 37; CBS R. 57). The national and regional networks, station licensees, and recording and transcription companies were invited to appear and present evidence. Other persons who requested an opportunity to appear were heard.

The testimony of the witnesses was under oath (e. g. Tr. 20), and was transcribed and embodied in the record. All testimony was, of course, subject to rebuttal. And although, as CBS points out in its brief (p. 99), the Commission originally indicated that cross-examination of witnesses would generally be by the committee and its staff, that questions to be proposed by the parties should be put through Commission officials, and that cross-examination by the other persons present would be allowed only when the committee decided that the ends of justice would be served (Tr. 13), this policy was not adhered to. The appellants prepared their cases and examined their own witnesses, who were then cross-examined by Commission counsel and thereafter offered for redirect examination by

network counsel. The appellants were permitted to cross-examine all persons called as Commission witnesses. In the course of the hearings counsel for CBS stated on behalf of CBS and NBC that they had fully availed themselves of the opportunity to place before the Commission all information necessary for an understanding of the problem prior to the making of any regulations (Tr. 8482–8483). Counsel for NBC stated during the hearings that where he had requested opportunity to cross-examine he had been accorded that right (Tr. 8486):

In all, the committee heard 96 witnesses on 73 days of hearings. Their evidence fills 27 volumes—8,713 pages of transcript and 707 exhibits. The greater part of the testimony and evidence at the hearings relevant to the regulations here attacked was prepared and presented by NBC, CBS, and Mutual. Twenty of the 96 witnesses were called by NBC; their testimony fills 3,225 pages of transcript. Seventeen witnesses appeared on behalf of CBS, whose testimony fills 2,180 pages of transcript. The testimony of eight witnesses for Mutual fills 670 pages of transcript. It is significant that the very contentions later urged in argument before the Commission, before the court below, and before this Court, relating to the desirability and reasonableness of the restrictions were urged by appellant networks *in the form of testimony at the hearings* (e. g. Tr. 1713; 1714–1716;

1792–1795; 1819–1820; 1852–1854; 2595–2598; 3443–3446; 3457–3459; 3462–3464; 3496–3499; 3718–3719; 8514–8518; 8520–8522; 8542–8544; 8545–8546).

On June 12, 1940, the committee submitted its report and on November 28, 1940, the Commission issued draft regulations in order to give scope and direction to the oral argument (NBC R. 133–138; CBS R. 153–158). These draft regulations, though different in detail, covered the same subjects as those finally adopted.

Thereafter extensive briefs were filed and oral argument presented before the full Commission. On May 2, 1941, the Commission issued its final report, together with an order adopting the regulations. In its Report, the Commission expressly stated (NBC R. 39; CBS R. 59):

> The views expressed and the regulations adopted herein are, we believe, fully supported by the evidence adduced at the hearings by the networks and other interested parties. With respect to such matters as the present allocation and ownership of particular broadcasting facilities, we have utilized our current official records. The historical data in the early chapters includes matters of common knowledge or of public record.

Before the regulations finally became effective, Mutual petitioned the Commission to amend two of them, and after additional briefs and oral argu-

ment and upon full reconsideration, on October 11, 1941, the Commission issued a supplemental report together with amendments to three of the regulations (NBC R. 201–217; CBS R. 20–36). The final paragraph of this report made clear the Commission's readiness to entertain other petitions for modification (NBC R. 212; CBS R. 31):

> The Commission stands ready at all times to amend and modify its regulations upon the petition of any network, national or regional, or any station or group of stations if it can be shown that those regulations prevent profitable network operations, or unduly disturb any aspect of broadcasting, or that because of special or changed circumstances the chain broadcasting regulations should not be applicable to any particular situation.

We do not understand appellants to claim that these procedures which we have thus summarized deprived them of a fair hearing in the constitutional sense at all. Rather, they urge that since the procedures were not "quasi-judicial," they were not of such character as to entitle the administrative record to form the basis for judicial review, and appellants had, therefore, a right to a judicial retrial (CBS Br. 98–102; NBC Br. 91–94). Specifically, appellants urge that they are entitled to judicial retrial because of three asserted defects in the Commission proceedings which destroy the effect of the administrative record: (1) the notice;

(2) the evidence relied upon by the Commission; and (3) cross-examination. But in fact an examination of the proceedings before the Commission discloses that in none of these respects were the appellants deprived of adequate opportunities to present their own cases or to meet the cases against them.

As we have seen (*supra*, p. 123), the original order of investigation and the notice sent to the parties were fully informative and drew their attention to the very matters with which the regulations were ultimately concerned.[102] Indeed, the transcript itself establishes the adequacy of the notice. It contains not only the *facts* with respect to the contractual provisions and network practices dealt with by the regulations, but also appellants' justification, in testimonial form, of these provisions and practices (see *supra*, pp. 125–126). Nor is the notice itself the only source to which to look to establish that appellants were fully apprised of the issues in ample time to meet them. Following the extensive hearing, in the course of which the

[102] Compare the notice practice of the Interstate Commerce Commission in rule making. The Commission holds hearings prior to issuing general rules, but it does not announce in advance the text of the regulations. Rather, it merely states in advance the general object of the inquiry. E. g., Attorney General's Committee on Administrative Procedure, *Interstate Commerce Commission*, S. Doc. 10, 77th Cong., 1st sess., Part 11, p. 96; *Assigned Car Cases*, 274 U. S. 564; *Chicago, R. I. & P. Ry. v. United States*, 284 U. S. 80.

issues were further focused, the committee's report was issued and then a draft of the regulations followed (see *supra,* p. 126). Upon this report and the draft regulations there was oral argument before the Commission, in which all parties, including the Commission's counsel, participated. Even after the Commission's report, there was a reopening for the purpose of further argument, which led to a complete "reconsideration" by the Commission (NBC R. 201–203; CBS R. 20–22). And the supplemental report itself afforded the parties further opportunity—of which they did not avail themselves—to request changes (*supra,* p. 127). Plainly, in these circumstances, the notice was adequate and no prejudice occurred. Cf. *Morgan* v. *United States,* 304 U. S. 1, 19.

The same considerations foreclose appellants' argument based upon the Commission's alleged use of extra-record materials. Administrative utilization of "official" or judicial notice has been recognized as wholly proper, even in adjudicatory proceedings. See *Final Report of Attorney General's Committee on Administrative Procedure,* S. Doc. 8, 77th Cong., 1st sess., pp. 71–73. And official notice is particularly appropriate in rule making. See Attorney General's Committee on Administrative Procedure, *Interstate Commerce Commission,* S. Doc. 10, 77th Cong., 1st sess., Part 11, pp. 97–98. Here, the Commission expressly specified the facts of which it was taking

notice (*supra*, p. 126),[103] facts which were notorious, which were not denied, and which are not even now suggested to be in dispute. Further hearing was thereafter afforded; the parties were thus apprised of the action of the Commission and had full opportunity to argue whatever conflicting inferences may have arisen from them.[104]

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[103] Thus the procedure was precisely in accordance with that recommended in respect of official notice in the *Final Report*, *op. cit. supra*, pp. 72–73.

[104] In the same connection CBS (Br. p. 101) also objects to the Commission's consideration in its Supplemental Report of October 11, 1941, "of the testimony presented before the Senate Committee on Interstate Commerce, of the considerations presented at the conferences [with representatives of the networks themselves] which followed the hearings, and of the oral arguments presented at the hearing on Mutual's petition and of the briefs filed at that time * * *." As a result of these proceedings which culminated in the Supplemental Report, the reach of the original regulations was modified. This, of course, was beneficial to the appellants, and they do not suggest that they were in any way prejudiced thereby.

And, it is to be noted, the Senate hearings and Commission conferences were devoted not to the primary facts, but to considerations going to the Commission's ultimate judgment. In effect, therefore the Commission did no more than consider additional material of the type included in briefs and oral arguments. Indeed, this was precisely the way CBS itself treated this material. In its brief filed with the Commission on reconsideration (September 12, 1941), CBS included the statement made by its president before the Senate Committee (pp. 5, 15–83). In the light of this circumstance, CBS is not now in a position to urge that the Commission was in error in considering the very material which it embodied in a brief filed with the Commission.

Finally, the asserted restriction upon the right of cross-examination was at most purely formal (*supra*, pp. 124–125). And, in any event, cross-examination, which is vital only where, unlike the situation here, there is a dispute concerning facts may appropriately be limited in rule making proceedings. E. g., *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294; Fuchs, *Procedure in Administrative Rule-Making* (1938) 52 Harv. L. Rev. 259, 278; Attorney General's Committee on Administrative Procedure, *Federal Communications Commission*, S. Doc. 186, 76th Cong., 3d sess., Part 3, pp. 78–79; *ibid.*, *Administration of the Fair Labor Standards Act*, 77th Cong., 1st sess., S. Doc. No. 10, Part 1, pp. 38–39; *ibid.*, *Interstate Commerce Commission*, S. Doc. No. 10, 77th Cong., 1st sess., Part 11, p. 97.

It is thus apparent that there was nothing in the procedures which the Commission adopted which vitiated the record or made it so meaningless as to require its disregard upon judicial review. Moreover, in appraising the adequacy of this procedure it must be remembered that the Commission was not here conducting a negligence case or an unfair labor practice case. A refusal to import without modification inappropriate procedural rules into a rule-making or "quasi-legislative" proceeding can scarcely justify ignoring the administrative record. We may assume that there can be a judicial trial *de novo* if there is no record,

in the usual sense, at all. Cf. *Borden's Farm Products* v. *Baldwin*, 293 U. S. 194. But here, we submit, the procedures were wise adaptations to the subject matter with which the Commission was dealing in view of the nature of the administrative action to be taken. And this Court, as well as administrative law commentators, have recognized that procedural requirements vary with the nature of the administrative task, and that the requisites of a hearing preceding administrative rule-making may differ from those preceding an adjudication. Cf. *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294; see Fuchs, *Procedure in Administrative Rule-Making* (1938) 52 Harv. L. Rev. 259, 264–265, 280; *Final Report of Attorney General's Committee on Administrative Procedure*, S. Doc. 8, 77th Cong., 1st sess., pp. 109–111; Attorney General's Committee on Administrative Procedure, monographs cited *supra*, p. 131.

Indeed the very procedural matters of which appellants complain are those which are peculiarly affected by the fact that the proceeding involves rule making and not adjudication. For, as stated by the Attorney General's Committee on Administrative Procedure in its *Final Report* (*op. cit. supra*, p. 109):

> The application of the procedures of a judicial trial to administrative rule making is limited, however, by the distinctive characteristics of rule making proceedings.

> The issues are normally complex and numerous; the parties may be diverse and not alignable into classes; the outcome will involve a judgment concerning the consequences of rules to be prescribed for the future and a discretion in devising measures to effectuate the policies of the statute. These factors differentiate these proceedings from the normal judicial trial in which adversary hearings are traditionally employed, and *accordingly limit the possibility of defining issues in advance, of addressing evidence to them, of permitting systematic cross-examination,* * * * [Italics added].

The touchstone, then, is not perfect conformity to the procedure of judicial hearings, but, broadly, its fairness as affording full opportunity to present relevant facts and arguments. That test was plainly met here. Examination of the transcript, the briefs filed with the committee, with the full Commission prior to the issuance of the regulations, and with the Commission upon reconsideration, demonstrate beyond doubt that the facts and the parties' contentions were fully litigated. The very arguments now advanced by appellants to establish that the regulations are unreasonable were advanced by them in testimony (*supra*, pp. 125–126) before the Commission, in oral arguments, and in the several sets of briefs. Despite the elaborate post-hearing procedures, the reopenings, and the invitations to come forward to propose further

modifications (*supra*, pp. 126–127), appellants at no time suggested that they wished additional evidence or argument. And, indeed, it is plain that there was no occasion for such a suggestion, for, as stated by appellant, CBS in its brief filed with the Commission on September 10, 1941, on rehearing (pp. 4–5):

> We have *repeatedly maintained* that the regulations are arbitrary, unreasonable and contrary to the purposes of the Act. * * *
>
> In the face of *competent and expert testimony as to the foreseeable destructive effects of these regulations* on overall network service, the Commission offers [no] real justification for the assertion that exclusive affiliation or time options or contracts for more than one year have adversely affected the program service of the stations, their prosperity, or the service rendered to the public. * * *
>
> We reaffirm earnestly and seriously that the Commission has not considered completely and thoroughly the probable consequences of its rules to network broadcasting and to broadcasting generally. *We suggested these considerations in our brief and oral argument to the Commission prior to the adoption of the rules.* [Italics added.]

And, as we have noted (*supra*, p. 125), CBS's counsel stated at the Commission hearings, in behalf of CBS and NBC that they had fully availed themselves of the opportunity to present the Com-

mission with all information necessary to an understanding of the problem prior to the promulgation of any regulations. The issues, therefore, were fully canvassed and recanvassed before the Commission. In the light of these circumstances, of the fact that appellants never indicated before the Commission that they did not have full opportunity to present testimony, or meet the issues raised, and of the fact that appellants do not even now come forward to specify what new facts, not before the Commission, they wish to show, appellants are scarcely in a position now to insist that they are entitled to a hearing *de novo* in the court below.

Indeed, the controversy between the parties is not concerning the primary facts giving rise to the regulations;[105] it concerns only the ultimate issue of their effect and their wisdom (see CBS complaint, paragraphs 6 and 10; NBC complaint, paragraphs 25, 36, 38, and 40). In support of their allegations, appellants presumably would offer expert testimony to show that the regulations would result in less efficient network operations, or diminished ability to compete with other advertising media (CBS complaint, par. 6), lower quality public service (*id.* par. 10; NBC complaint, par. 25), and the disruption of the ordinary course of network

[105] In fact, NBC appears to concede (Br. 95) that the record is complete as to "exposition" if not "defense."

business (NBC complaint, pars. 36, 38, and 40) and would generally be inconsistent with the public interest. Yet these are the very considerations which must be, and have been, addressed to the Commission; they are conclusionary issues for it to resolve, and it has resolved them.

Moreover, it would be futile to permit appellants to introduce evidence to support these allegations before the court; such evidence would be of no assistance to the court. Its only function is to inquire whether there is a reasonable basis for the Commission's regulations, or stated another way, whether the regulations have a rational relationship to the permissible statutory objectives (*supra*, p 79). The reviewing court has all the necessary materials at hand, embodied in the transcript, to perform this function. It cannot be aided by a new parade of witnesses who may testify in support of the appellants' allegations. As the court below observed (NBC R. 531; CBS R. 492–493)—

> * * * if the evidence went to contradict or overthrow the findings, we could not bring it into hotchpot with the evidence taken by the Commission, without deciding the issues in the first instances ourselves. We have no such power; it would upset the whole underlying scheme of an expert commission, whose orders must stand or fall upon such evidence as it had before it.

Thus even if the weight of the evidence adduced at the trial *de novo* should support the appellants' allegations, and the court could assimilate such testimony to the material which was before the Commission, it could not rely on "testimony and prophecies and impressions of expert witnesses" to supplant the Commission's judgment, "even in the face of convincing proof that a different result would have been better." *Railroad Commission of Texas* v. *Rowan & Nichols Oil Co.*, 311 U. S. 570, 576; *ibid.*, 310 U. S. 573, 585. For, as stated by this Court, to allow administrative "findings to be attacked or supported in court by new evidence would substitute the court for the administrative tribunal" as the rule-making body. *Tagg Brothers & Moorhead* v. *United States*, 280 U. S. 420, 444.

Nor is there any reason to reach a contrary result, as appellants appear to suggest (NBC Br. 91; CBS Br. 98), because the Commission may not have been *required* to hold the instant hearings. The fact, as we have seen, is that a full and fair hearing *was* held. If, in fact, the administrative agency does hold a hearing prior to its promulgation of regulations, precisely the same reasons of accommodation between the administrative and the judicial processes preclude a trial *de novo*, whether or not such hearings happen to be required by statute.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

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APPENDIX

Excerpts from the Communications Act of 1934, as amended:

SECTION 1. For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a Commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

SEC. 3. For the purposes of this Act, unless the context otherwise requires—

* * * * *

(h) "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a per-

son engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

* * * * * *

(p) "Chain broadcasting" means simultaneous broadcasting of an identical program by two or more connected stations.

* * * * * *

SEC. 4. * * * (i).

* * * * * *

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

(j) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publications of records or proceedings containing secret information affecting the national defense.

* * * * * *

SECTION 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right,

beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

* * * * *

SEC. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity require, shall—

* * * * *

(f) Make such regulations not inconsistent with law as it may deem necessary to

prevent interference between stations and to carry out the provisions of this Act: *Provided, however,* That changes in the frequencies, authorized power, or in the times of operation of any station shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

* * * * *

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

* * * * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

* * * * *

SEC. 307. (a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

* * * * *

(d) No license granted for the operation of a broadcasting station shall be for a longer

term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses, but action of the Commission with reference to the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications.

* * * * * *

SEC. 308. (a) The Commission may grant licenses, renewal of licenses, and modification of licenses only upon written application therefor received by it: *Provided, however,* That in cases of emergency found by the Commission, licenses, renewals of licenses, and modifications of licenses, for stations on vessels or aircraft of the United States, may be issued under such conditions as the Commission may impose, without such formal application. Such licenses, however, shall in no case be for a longer term than three months: *Provided, further,* That the Commission may issue by cable, telegraph, or radio a permit for the operation of a station on a vessel of the United States at sea, effective in lieu of a license until said vessel shall return to a port of the continental United States.

(b) All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the

station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation.

* * * * * *

SEC. 309. (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

(b) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a

statement of the following conditions to which such license shall be subject:

(1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein.

(2) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act.

(3) Every license issued under this Act shall be subject in terms to the right of use or control conferred by section 606 hereof.

SEC. 310. (a) The station license required hereby shall not be granted to or held by—

(1) Any alien or the representative of any alien;

(2) Any foreign government or the representative thereof;

(3) Any corporation organized under the laws of any foreign government;

(4) Any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country;

(5) Any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted, after June 1, 1935, by aliens, their representatives, or by a foreign government or representative thereof, or

by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or the revocation of such license.

Nothing in this subsection shall prevent the licensing of radio apparatus on board any vessel, aircraft, or other mobile station of the United States when the installation and use of such apparatus is required by Act of Congress or any treaty to which the United States is a party.

(b) The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing.

SEC. 311. The Commission is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person (or to any person directly or indirectly controlled by such person) whose license has been revoked by a court under section 313, and is hereby authorized to refuse such station license and/or permit to any other person (or to any person directly or indirectly controlled by such person) which has been finally adjudged guilty by a Federal court of unlawfully monopolizing or attempting unlawfully to monopolize, radio communication, directly or indirectly, through the control of the manufacture or sale of radio apparatus, through exclusive traffic arrange-

ments, or by any other means, or to have been using unfair methods of competition. The granting of a license shall not estop the United States or any person aggrieved from proceeding against such person for violating the law against unfair methods of competition or for a violation of the law against unlawful restraints and monopolies and/or combinations, contracts, or agreements in restraint of trade, or from instituting proceedings for the dissolution of such corporation.

SEC. 313. All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said Commission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: *Provided, however,* That

such licensee shall have the same right of appeal or review as is provided by law in respect of other decrees and judgments of said court.

SEC. 314. After the effective date of this Act no person engaged directly, or indirectly through any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such person, or through an agent, or otherwise, in the business of transmitting and/or receiving for hire energy; communications; or signals by radio in accordance with the terms of the license issued under this Act, shall by purchase, lease, construction, or otherwise, directly or indirectly, acquire, own, control, or operate any cable or wire telegraph or telephone line or system between any place in any State, Territory, or possession of the United States or in the District of Columbia, and any place in any foreign country, or shall acquire, own, or control any part of the stock or other capital share or any interest in the physical property and/or other assets of any such cable, wire, telegraph, or telephone line or system, if in either case the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or unlawfully to create monopoly in any line of commerce; nor shall any person engaged directly, or indirectly through any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such person, or through an agent, or otherwise, in the business of transmitting and/or receiv-

ing for hire messages by any cable, wire, telegraph, or telephone line or system (a) between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any other State, Territory, or possession of the United States; or (b) between any place in any State, Territory, or possession of the United States, or the District of Columbia, and any place in any foreign country, by purchase, lease, construction, or otherwise, directly or indirectly acquire, own, control, or operate any station or the apparatus therein, or any system for transmitting and/or receiving radio communications or signals between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or shall acquire, own, or control any part of the stock or other capital share or any interest in the physical property and/or other assets of any such radio station, apparatus, or system, if in either case the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or unlawfully to create monopoly in any line of commerce.

* * * * * *

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